

- 4.7 any other fact, circumstance, provision of statute or rule of law which might, were the Surety's liability to be secondary rather than primary, entitle the Surety to be released or discharged in whole or in part from the Surety's undertaking.
5. Not Used.
6. Not Used
7. Not Used.
8. **tie** shall be at liberty to compromise, release, waive or neglect any security as it sees fit, without impairment of their rights under this Bond.
9. This Bond shall cease to have effect on *[Insert date falling 18 months after the date on which the Advance Payment was made to Tramco]*, save in connection with any Demand Notice issued to the Surety in writing at any time up to 30 days from such date.
10. **tie** shall be entitled to assign or transfer this Bond without the consent of the Surety subject to giving notice to the Surety.
11. Any Demand Notice to be served by **tie** pursuant to this Bond shall be sent by **tie** to the Surety, to the Surety's address at *[Insert Address]* (and if sent by special or recorded delivery shall be taken as having been received by the Surety on the date of receipt by the Surety as evidenced by the relevant certificate of delivery) or shall be delivered personally to the Surety at the address set out in this Clause (and shall be deemed to have been received at the time of delivery).
12. Not Used
13. This Bond shall be governed by and construed in accordance with the Laws of Scotland and the Parties hereby agree to submit to the exclusive jurisdiction of the Court of Session over any claim arising out of this Bond.
14. A person who is not a party to this Bond shall have no right to enforce any of the terms of this Bond.
15. In this Bond:

15.1 the words and expressions have the same meanings as in the Tram Supply Agreement and the Surety shall be deemed to have full knowledge of the terms and conditions of the Tram Supply Agreement;

15.2 "person" includes any firm and any entity having legal capacity; and

15.3 the definitions given in the recitals apply to the rest of this Bond.

IN WITNESS WHEREOF

EXECUTED for and on behalf of **[THE SURETY]** at

on _____ 2008 by:

Director/Authorised Signatory _____

Full Name _____

Witness Signature _____

Full Name _____

Address _____

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

on _____ 2008 by:

Director/Authorised Signatory _____

Full Name _____

Witness Signature _____

Full Name _____

Address



(1) **tie LIMITED**

- and -

(2) **CITY OF EDINBURGH COUNCIL**

- and -

(3) **NETWORK RAIL INFRASTRUCTURE LIMITED**

**SUPPLEMENTAL
AGREEMENT**

relating to

variation of the Protective Provisions
Agreement

SUPPLEMENTAL AGREEMENT

AMONG

- (1) **tie LIMITED**, (company number SC230949), whose registered office is at City Chambers, High Street, Edinburgh EH1 1YJ ("**tie**");
- (2) **CITY OF EDINBURGH COUNCIL**, the Local Authority for the said City constituted in terms of the Local Government etc. (Scotland) Act 1994 and having its principal offices at City Chambers, High Street, Edinburgh EH1 1YJ ("**CEC**"); and
- (3) **NETWORK RAIL INFRASTRUCTURE LIMITED**, a company registered in England and Wales (company number 2904587) whose registered office is at 40 Melton Street, London NW1 2EE ("**Network Rail**").

WHEREAS:

- (A) **tie**, **CEC** and **Network Rail** entered into an agreement relating to protective provisions in respect of the construction of a light rail system known as "Edinburgh Tram System" dated 17 and 21 June 2005 ("**Protective Provisions Agreement**");
- (B) The Parties (as hereinafter defined) have now agreed to vary the terms of the Protective Provisions Agreement as set out below.

IT IS AGREED as follows:

1. INTERPRETATION

1.1 In this agreement:

"**Asset Protection Agreement**" means the agreement entered into among **tie**, **CEC** and **Network Rail** relating to provisions in respect of the Project dated 13 March 2008 and subsequent dates shortly thereafter;

"**Supplementary Agreement**" shall mean this supplemental agreement entered into among **tie**, **CEC** and **Network Rail** in order to vary the terms of the Protective Provisions Agreement; and

"**Parties**" shall mean **tie**, **CEC** and **Network Rail**.

1.2 All capitalised terms used herein unless otherwise defined shall have the meanings given to them in the Protective Provisions Agreement.

2. **AMENDMENT**

2.1 The Parties agree that the Protective Provisions Agreement shall be amended so that:

2.1.1 the definition of Losses in Clause 9(1) shall read:

"Losses" means any costs, claims, damages, demands, losses, expenses, liabilities or proceedings incurred by Network Rail provided that, for the purposes of Clause 9(2), Losses shall be deemed to exclude any cost and expense which is an Additional Expense as defined in Clause 12.6 of the Asset Protection Agreement.

2.1.2 the following definition is added at Clause 9(1):

"Asset Protection Agreement" means the agreement entered into among tie, CEC and Network Rail relating to provisions in respect of the Project dated 13 March 2008 and subsequent dates shortly thereafter;

3. **CONFIRMATION**

3.1 For the avoidance of doubt, nothing in this Supplementary Agreement shall in any way affect the meaning of and effect of the Asset Protection Agreement.

3.2 The Parties agree that save as modified above the Protective Provisions Agreement shall remain in full force and effect.

IN WITNESS whereof these presents on this and the preceding page are executed as follows:

EXECUTED for and on behalf of tie
LIMITED at EDINBURGH

on 13 MARCH 2008 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

[Redacted Signature]

WILLIAM GALLAGHER

[Redacted Signature]

CHRISTOPHER PAUL HORSLEY

13F1 BELLEVUE CRESCENT
EDINBURGH, EH3 6ND

EXECUTED for and on behalf of CITY OF
EDINBURGH COUNCIL at

on 14 March 2008 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

[Redacted]
[Redacted]
[Redacted]
Philip Watt
Colling House, Rutland Square
Edinburgh EH1 2AA

EXECUTED for and on behalf of
NETWORK RAIL INFRASTRUCTURE
LIMITED at EDINBURGH

on 13th MARCH 2008 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

[Redacted]
RONALD WILLIAM M GULAY
[Redacted]
Allan Louise Plantmore
Excel House, 30 Sample Street
Edinburgh L

Andy Conway

From: Steve Sladdin
Sent: 14 March 2008 12:56
To: Duncan Fraser
Cc: Andy Conway; Rebecca Andrew; Alan Coyle; Colin MacKenzie
Subject: FW: Network Rail/ City of Edinburgh Council --- Edinburgh Tram ---RAI/1/1893
Importance: High
Attachments: Scan from a Xerox WorkCentre Pro

Duncan
So that's it - Framework committed to be signed
Assumed APPA signed by Gill.
NR now all green status for deliverables.
Regards
Steve

From: Mike Fitzgerald [mailto:Mike.Fitzgerald@dundas-wilson.com]
Sent: 14 March 2008 12:36
To: Gordon M Thomson
Cc: Steve Sladdin; Alasdair Sim; Colin MacKenzie; Caroline Storrie
Subject: RE: Network Rail/ City of Edinburgh Council --- Edinburgh Tram ---RAI/1/1893
Importance: High

Thank you Gordon.

City of Edinburgh Council have advised that I can confirm agreement to this - they would however like to have a timetable for execution and I think it would be sensible to provide for execution within the next 10 days. Can you confirm that is ok. The Council are in any event relying on the attached undertaking even if we can't get a specific timetable sorted.

For the sake of completeness I attach copies of your various e mails of yesterday and this morning with the agreed annexations for the Framework Agreement, albeit subject to plans being finalised per your attached e mail. It is these that will be annexed to the principal Framework Agreement

Many thanks for your help.

Regards.

Mike

Michael P Fitzgerald
Partner - Real Estate
Dundas & Wilson CS LLP
DDI [REDACTED]
Mob [REDACTED]
Switchboard +44 (0)131 228 8000
Web: www.dundas-wilson.com

21/07/2008

CEC01244182_0566

From: Gordon M Thomson [mailto:gordon.thomson@macroberts.com]
Sent: 14 March 2008 11:49 AM
To: Mike Fitzgerald
Cc: Sydney Brian; White Jeremy; Karen Gribben; Cecilia Miller
Subject: Network Rail/ City of Edinburgh Council --- Edinburgh Tram ---RAI/1/1893

Dear Mike

On behalf of Network Rail Infrastructure Limited and with reference to the above project, I am pleased to confirm formally that they agree to enter into the Framework Agreement with your clients the City of Edinburgh Council in terms of the draft thereof annexed as soon as reasonably practicable subject to finalising one or two of the plans to be annexed to the deed as to which both parties shall act reasonably. It is acknowledged by my clients that the Council and others may be relying on the terms of this letter in relation to significant contractual commitments with third parties.

Please acknowledge/ confirm agreement.

Kind regards
Gordon

Gordon Thomson
Partner
MacRoberts

Tel: (+44) [REDACTED]
Fax: (+44) [REDACTED]

152 Bath St, Glasgow G2 4TB

web: www.macroberts.com

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Caroline Storrie

From: Christine Baird [christine.baird@macroberts.com] on behalf of Gordon M Thomson [gordon.thomson@macroberts.com]
Sent: 13 March 2008 16:05
To: Mike Fitzgerald
Cc: Caroline Storrie; Brian.Sydney@networkrail.co.uk; Jeremy.WHITE@networkrail.co.uk
Subject: Edinburgh Trams - RAI/1/1983 - EMAIL 1
Attachments: LEASE between NETWORK RAIL and tie LIMITED.DOC; Deed of Real Burdens and Servitudes.DOC; Neighbour agreement plans.PDF; Neighbour agreement plans.PDF; Neighbour agreement plans.PDF; Neighbour agreement plans.PDF; Neighbour agreement plans.PDF; car park lease plan (with access).PDF

SIX EMAILS SENT IN TOTAL TO INCLUDE ALL THE ATTACHMENTS

Mike

With the time of day now reached I felt I should pass over to you the details of attachments for the framework agreement and these are as above detailed.

We are still to finalise the framework agreement and also the environmental clauses in the two leases and there are a couple of points in the attachments on which we are waiting for client approval which should be cleared very shortly.

I hope this takes matters a bit further forward.

Regards.

Gordon

Gordon Thomson
Partner
MacRoberts

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switchboard: +44(0) 141 332 9988
fax: +44(0) 141 332 8886
152 Bath Street, Glasgow. G2 4TB.

web: www.macroberts.com

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14/03/2008

Caroline Storrie

From: Christine Baird [christine.baird@macroberts.com] on behalf of Gordon M Thomson [gordon.thomson@macroberts.com]
Sent: 13 March 2008 16:05
To: Mike Fitzgerald
Cc: Caroline Storrie; Brian.Sydney@networkrail.co.uk; Jeremy.WHITE@networkrail.co.uk
Subject: Edinburgh Trams - RAI/1/1893 - EMAIL 2
Attachments: Operating Framework Agreement.DOC; car park Lease - Edinburgh Tram.DOC; Deed of servitude.DOC; Haymarket Station servitudes 1.PDF; Haymarket Station servitudes 2.PDF; Balgreen Road servitude.PDF

Attachments relating to previous Email 1

Gordon Thomson
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Caroline Storrie

From: Christine Baird [christine.baird@macroberts.com] on behalf of Gordon M Thomson [gordon.thomson@macroberts.com]
Sent: 13 March 2008 16:05
To: Mike Fitzgerald
Cc: Caroline Storrie; Brian.Sydney@networkrail.co.uk; Jeremy.WHITE@networkrail.co.uk
Subject: Edinburgh Tram - RAI/1/1893 - EMAIL 3
Attachments: surrender area.PDF; Balgreen plan.PDF; 030308 Railway Access Points - Almond Viaduct N Plan 17.PDF; 030308 Railway Access Points - Almond Viaduct S Plan 16.PDF; 030308 Railway Access Points - Dolphinton Plan 18.PDF; 030308 Railway Access Points - Balgreen Plan 4.PDF

Attachments referred to in Email 1

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web: www.macroberts.com

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14/03/2008

Caroline Storrie

From: Christine Baird [christine.baird@macroberts.com] on behalf of Gordon M Thomson [gordon.thomson@macroberts.com]
Sent: 13 March 2008 16:06
To: Mike Fitzgerald
Cc: Caroline Storrie; Brian.Sydney@networkrail.co.uk; Jeremy.WHITE@networkrail.co.uk
Subject: Edinburgh Tram - RAI/1/1893 EMAIL 4
Attachments: 030308 Railway Access Points - Gogar Plan 8.PDF; 030308 Railway Access Points - Gogar Station Rd Plan 9.PDF; 030308 Railway Access Points - Haymarket Plan 1.PDF; 030308 Railway Access Points - Lenniemoir Turnhouse Plan 15.PDF; 030308 Railway Access Points - Meadow PI Rd S Gyle Plan 6.PDF; 030308 Railway Access Points - S Gyle Plan 7.PDF

Attachments re Email 1

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web: www.macroberts.com

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14/03/2008

Caroline Storrie

From: Christine Baird [christine.baird@macroberts.com] on behalf of Gordon M Thomson [gordon.thomson@macroberts.com]
Sent: 13 March 2008 16:06
To: Mike Fitzgerald
Cc: Caroline Storrie; Brian.Sydney@networkrail.co.uk; Jeremy.WHITE@networkrail.co.uk
Subject: Edinburgh Trams - RAI/1/1893 - EMAIL 5
Attachments: 030308 Railway Access Points - Newbridge Jctn Plan 12.PDF; 030308 Railway Access Points - Newbridge Plan 13.PDF; 030308 Railway Access Points - Norton Mains Plan 10.PDF; 030308 Railway Access Points - Ratho Plan 11.PDF; 030308 Railway Access Points - Slateford Plan 2.PDF; 030308 Railway Access Points - Slateford Yard Plan 3.PDF

Attachments re Email 1

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Caroline Storrie

From: Christine Baird [christine.baird@macroberts.com] on behalf of Gordon M Thomson [gordon.thomson@macroberts.com]
Sent: 13 March 2008 16:06
To: Mike Fitzgerald
Cc: Caroline Storrie; Brian.Sydney@networkrail.co.uk; Jeremy.WHITE@networkrail.co.uk
Subject: Edinburgh Trams - RAI/1/1893 - EMAIL 6
Attachments: 030308 Railway Access Points - Turnhouse Rd Plan 14.PDF; 18211900_1_UKMATTERS (Supplemental Agreement).DOC; 18214013_2_UKMATTERS(Asset Protection Agreement Engrossment 13.03.08).DOC; Parts 8 and 10; Bridge Agreement.DOC; Lease.DOC; Deed of Servitude (2).DOC; Disposition.DOC; 030308 Railway Access Points - Stenhouse Plan 5.PDF

Attachments re Email 1

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14/03/2008

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Caroline Storrie

From: Christine Baird [christine.baird@macroberts.com] on behalf of Gordon M Thomson [gordon.thomson@macroberts.com]
Sent: 14 March 2008 09:34
To: Brian.Sydney@networkrail.co.uk; Jeremy.WHITE@networkrail.co.uk; Cecilia Miller
Cc: Caroline Storrie; Mike Fitzgerald; Gillian Scoular
Subject: Edinburgh Tram - RAI/1/1893
Attachments: Car Park Lease.DOC; Tram Lease.DOC

Dear All

Herewith please find attached the final versions of the main tramline lease and car park lease, the environmental details in each having been finalised yesterday.

A revised version of the framework agreement is currently being considered and when this and all relevant plans are agreed we should be on the home straight for signing.

Regards.

Gordon

Gordon Thomson
Partner
MacRoberts

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web: www.macroberts.com

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14/03/2008

Andy Conway

From: Rebecca Andrew
Sent: 13 March 2008 16:18
To: Duncan Fraser; Steve Sladdin; Colin MacKenzie
Cc: Alan Coyle
Subject: FW: Contractors Assurance Case

Rebecca Andrew | Principal Finance Manager | Financial Services | The City of Edinburgh Council | Waverley Court, Level 2:5, 4 East Market Street, Edinburgh, EH8 8BG | Tel [REDACTED] | rebecca.andrew@edinburgh.gov.uk | www.edinburgh.gov.uk

From: Donald McGougan
Sent: 13 March 2008 16:02
To: Rebecca Andrew
Subject: FW: Contractors Assurance Case

From: Willie Gallagher [mailto:Willie.Gallagher@tie.ltd.uk]
Sent: 13 March 2008 15:04
To: Gill Lindsay; Andrew Holmes; david_mackay@[REDACTED]; Neil Renilson (TEL); Donald McGougan
Subject: FW: Contractors Assurance Case

For info

From: David Henderson [mailto:david.henderson@macroberts.com]
Sent: 13 March 2008 15:02
To: McAulay Ron; Alasdair Sim; Tuckerman Sandy
Cc: Chris.Horsley@dlapiper.com; Steven Bell; Willie Gallagher; Doherty Kiernan; Baird James; Sydney Brian; Graeme Bissett (external contact); Scott.McFadzen@bilfinger.co.uk
Subject: RE: Contractors Assurance Case

Ron

Yes, you will see your email crossed with mine a couple of minutes ago. I confirm signing will be at 4.30pm at Semple St. Ask for Allan Mackenzie. I understand Chris or one of his colleagues will bring the agreed documents and once you have signed will then take away for signing by CEC and tie

Regards

David

David Henderson
Partner
MacRoberts

direct dial: +44 (0) [REDACTED]
switchboard: +44 (0)141 332 9988
mobile: [REDACTED]
direct fax: +44 (0)87033 60332

21/07/2008

CEC01244182_0576

152 Bath Street, Glasgow G2 4TB
web: www.macroberts.com

From: McAulay Ron [mailto:Ron.McAulay@networkrail.co.uk]
Sent: 13 March 2008 14:53
To: David Henderson; Alasdair.Sim@tie.ltd.uk; Tuckerman Sandy
Cc: Chris.Horsley@dlapiper.com; Steven.Bell@tie.ltd.uk; willie.gallagher@tie.ltd.uk; Doherty Kiernan; Baird James; Sydney Brian; graeme.bissett@[REDACTED]; Scott.McFadzen@bilfinger.co.uk
Subject: Re: Contractors Assurance Case

David,

Can I just check? Are we meeting at 4.30pm for signature? Has the time been confirmed?

Ron.

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

From: David Henderson <david.henderson@macroberts.com>
To: Alasdair Sim <Alasdair.Sim@tie.ltd.uk>; Tuckerman Sandy
CC: Horsley, Chris <Chris.Horsley@dlapiper.com>; Steven Bell <Steven.Bell@tie.ltd.uk>; Willie Gallagher <Willie.Gallagher@tie.ltd.uk>; Doherty Kiernan; Baird James; Sydney Brian; McAulay Ron; Graeme Bissett (external contact) <graeme.bissett@[REDACTED]>; Scott.McFadzen@bilfinger.co.uk <Scott.McFadzen@bilfinger.co.uk>
Sent: Thu Mar 13 14:39:40 2008
Subject: RE: Contractors Assurance Case

Alasdair

Thanks for this. The APA can now be signed

Regards

David

David Henderson
Partner
MacRoberts

direct dial: +44 [REDACTED]
switchboard: +44 (0)141 332 9988
mobile: +[REDACTED]
direct fax: +44 (0)87033 60332

152 Bath Street, Glasgow G2 4TB
web: www.macroberts.com <blocked::http://www.macroberts.com/>

From: Alasdair Sim [mailto:Alasdair.Sim@tie.ltd.uk]
Sent: 13 March 2008 14:30
To: David Henderson; Sandy.Tuckerman@networkrail.co.uk
Cc: Horsley, Chris; Steven Bell; Willie Gallagher; Doherty Kiernan; Baird James; Sydney Brian; McAulay Ron; Graeme Bissett (external contact); Scott.McFadzen@bilfinger.co.uk
Subject: RE: Contractors Assurance Case
Importance: High

21/07/2008

CEC01244182_0577

David

In response to your e-mail undernoted below, we confirm that sub-contractors cannot be appointed to undertake APA works by members of the BBS Consortium without the required licence to do so from Network Rail. We can confirm that Bilfinger Berger UK intend to obtain the required documentation from Network Rail.

We can further confirm that Siemens Transport System are part of the BBS Consortium and have available to them the required accreditation and licence to appoint sub-contractors to undertake APA works as may be required.

Regards

Alasdair

Alasdair Sim

Tram Project Interface Director

tie Limited

Citypoint

65 Haymarket Terrace

Edinburgh

EH12 5HD

Tel: [REDACTED]

Fax: +44(0)131 622 8301

Mob: [REDACTED]

Email: alasdair.sim@tie.ltd.uk <<mailto:alasdair.sim@tie.ltd.uk>>

www.transforedinburgh.com

www.tie.ltd.uk

From: David Henderson [<mailto:david.henderson@macroberts.com>]

Sent: 13 March 2008 12:12

To: Alasdair Sim; Sandy.Tuckerman@networkrail.co.uk

Cc: Horsley, Chris; Steven Bell; Willie Gallagher; Doherty Kiernan; Baird James; Sydney Brian; Sandy.Tuckerman@networkrail.co.uk; McAulay Ron

21/07/2008

CEC01244182_0578

Subject: RE: Contractors Assurance Case
Importance: High

Alasdair

Following discussions this morning, Network Rail have concluded that they can rely on the application of the Network Rail Requirements (Standard RT/LS/P/043) rather than seek the additional wording proposed this morning. However, there is a requirement for Contractors to have link up qualifications relevant to the APA works and a CAC. CAC have now been replaced by a Network Rail Licence and allows the contractors to employ subcontractors

NR understand that Bilfinger Berger UK (BB) are link up accredited (trackside for undertaking civil engineering aspects) so can do this element of the APA works. However they do not have a NR Licence and so are not authorised to appoint sub-contractors. Is it the intention for BB to do so, and if so will a NR Licence be obtained?

Siemens Plc are not link up accredited and do not have a NR Licence. Siemens Transport System (STS) is link up accredited and have a NR Licence. Please confirm that STS will carry out the APA works

We are instructed that confirm to us in writing that you will address the above matters to Network Rail's satisfaction prior to the Works Commencement Date (as defined in the APA)

Regards

David

David Henderson

Partner

MacRoberts

direct dial: +44 [REDACTED]

switchboard: +44 (0)141 332 9988

mobile: + [REDACTED]

direct fax: +44 (0)87033 60332

152 Bath Street, Glasgow G2 4TB

web: www.macroberts.com <blocked::http://www.macroberts.com/>

21/07/2008

CEC01244182_0579

From: Alasdair Sim [<mailto:Alasdair.Sim@tie.ltd.uk>]
Sent: 13 March 2008 10:58
To: Sydney Brian
Cc: David Henderson; Horsley, Chris; Steven Bell; Willie Gallagher
Subject: Contractors Assurance Case

Brian,

As discussed, the following is an extract from the APA flow down into the INFRACO contract and is accepted by BBS.

‘The INFRACO shall, and shall procure that each of its subcontractors shall, meet the requirements of Network rail’s Link Up Accreditation for all relevant classes of work to be carried out by the INFRACO or the particular subcontractor. The INFRACO shall, when required by tie demonstrate that both it and it’s subcontractors hold the relevant certificate from Network Rail confirming that it and its subcontractor has a Contractor’s Assurance Case.’

We understand that the above is acceptable to Network Rail and now removes the requirement to add the previously proposed wording on the Safety Management System in the APA. Please confirm this to be the position.

Thanks and regards

Alasdair

Alasdair Sim

Tram Project Interface Director

tie Limited

Citypoint

65 Haymarket Terrace

Edinburgh

EH12 5HD

Tel: +44(0) [REDACTED]

Fax: +44(0)131 622 8301

Mob: [REDACTED]

Email: alasdair.sim@tie.ltd.uk <<mailto:alasdair.sim@tie.ltd.uk>>

www.tramsforedinburgh.com

21/07/2008

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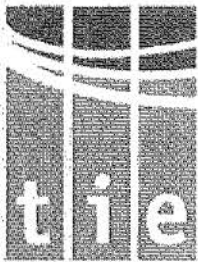
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FAO Brian Sydney
Network Rail Infrastructure Ltd
Buchanan House
58 Port Dundas Road
Glasgow
G4 0HG

Our Ref: DEL.CORR.151

Date: 26 February 2008

Dear Brian

RE: Basic Implementation Agreement (Lift and Shift Works)

Thank you for your letter of 22 February. Please find enclosed the signed copy of the above agreement as requested; we have also retained a signed copy for our file.

Yours sincerely

[Redacted Signature]
Alasdair Sim
Tram Interface Director

Enc

tie limited

Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD

tel +44 (0) 131 622 8300 / 623 8606 fax +44 (0) 131 622 8301 / 623 8601

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web: www.tie.ltd.uk

web: www.tie.ltd.uk

delivering transport projects

CEC01244182_0583

BASIC IMPLEMENTATION AGREEMENT (Emerging Cost)

Network Rail Infrastructure Limited

40 Melton Street, London NW1 2EE

tie Limited (the 'Customer')

Citypoint

65 Haymarket Terrace

Edinburgh EH12 5HD

Date 20th February 2008

Dear Sirs,

Basic Implementation Agreement relating to the Lift and Shift of Network Rail Buried Services and Other Equipment required to facilitate the construction of the Edinburgh Tram Network ('the Project').

1. The Customer has requested Network Rail Infrastructure Limited ('Network Rail') to procure the implementation of certain works to Network Rail's railway network on behalf of the Customer, as set out in Part 1 of the Schedule to this Agreement ('the Works'). The Customer has confirmed it will fund such work on the terms and conditions contained in this letter and the Schedules (collectively this letter and the Schedule in 2 Parts are referred to as 'this Agreement'). Network Rail and the Customer are collectively referred to as the Party or Parties for the purposes of this Agreement.
2. Network Rail will carry out an agreed procurement process for the implementation of the works (in accordance with any applicable regulations). Network Rail, in conjunction with the Customer, will select a suitable contractor and will negotiate suitable terms and conditions to implement the works under a works contract.
3. Network Rail estimates the cost of carrying out the Works to be £143,669 (excluding VAT) (the 'Estimated Project Costs'). Network Rail shall use its reasonable endeavours to carry out the Works for such amount but, without prejudice to the other terms of this Agreement, the Customer shall pay all costs incurred by Network Rail in accordance with Part 2 of the Schedule.
4. Without prejudice to paragraph 5 of this Agreement, each Party will:
 - (a) act in good faith towards the other Party in respect of this Agreement;
 - (b) use reasonable endeavours to avoid unnecessary complaints, disputes and claims against the other Party; and
 - (c) not interfere with the rights and obligations of the other Party under this Agreement nor in any other way hinder, prevent or delay the other Party from performing their obligations under this Agreement.
5. Unless expressly stated to the contrary, any reference in this Agreement to the right of consent, approval or agreement shall be construed such that such consent, approval or agreements shall not be unreasonably delayed or withheld. The Parties acknowledge that:
 - (a) the withholding or delaying of the giving of consent, approval or agreement by the Customer under this Agreement which would place Network Rail in breach of the law, the network licence, any Standard (as defined below) or any works contract would be unreasonable;

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- (b) nothing in this Agreement shall require Network Rail to give or procure the giving of any consent or approval which would be contrary to the protection, safety and efficient operation of the Railway (as defined below) and the safety of persons or property on or near the Railway; and
- (c) notwithstanding any other provision of this Agreement, in performing its obligations and exercising its rights under this Agreement Network Rail shall retain sole discretion in relation to safety issues.

For the purposes of this Agreement, '**Standards**' means Railway Group Standards and Network Rail Company Standards as at the date of this Agreement, and '**Railway**' means the network and Network Rail's operations on it.

6. An indicative programme is contained in Part 1 of the Schedule (the '**Implementation Programme**'), as may be amended in writing from time to time by Network Rail after reasonable consultation with the Customer. To the extent that any contractor is contractually liable to Network Rail for any failure to achieve the Implementation Programme (including any liability to pay liquidated damages), Network Rail shall have a corresponding liability to pay to the Customer the amounts actually recovered from the contractor but shall have no liability to the Customer whatsoever in respect of any delay to the Implementation Programme except in the event that the Works are not completed by 31st May 2008 (the 'Long Stop Date') due to the negligence or breach of this Agreement by Network Rail. Without prejudice to paragraph 14 of this Agreement, Network Rail's liability for any failure to achieve the Long Stop Date caused by its negligence or breach of this Agreement shall be satisfied in full by the payment of liquidated damages by Network Rail to the Customer at the rate of £1,000 per Business Day of delay. Any damages for delay shall be adjusted to the extent that the relevant delay is caused by the Customer's own negligence or breach of its obligations under this Agreement. The terms of this paragraph shall not affect any obligation of Network Rail to identify steps to avoid or minimise any delay in relation to achieving the target date for completion of the Works.
7. It may be necessary for Network Rail to apply for certain consents before it can carry out the Works. Network Rail will use its reasonable endeavours to obtain those consents but does not guarantee that the consents will be granted or that the terms of any consents granted will be acceptable to the Customer. The Customer shall be responsible for paying all costs reasonably incurred in applying for the consents and any costs or compensation payable as a consequence of the grant of the consents (except to the extent that they are due to the negligence or breach of Network Rail).
8. Network Rail will carry out and perform the services and procure the carrying out and completion of the Works in accordance with the works requirements (as set out in Part 1 of the Schedule):
 - (a) in accordance with legal requirements and such other mandatory standards as may be applicable to the rail industry from time to time;
 - (b) in accordance with the terms of any necessary consents;
 - (c) in a timely, economic and efficient manner, having regard at any particular time to Network Rail's obligations, purposes and duties as operator, maintainer, renewer and developer of the Network;
 - (d) exercising the degree of skill and care reasonably to be expected of a suitably qualified and competent professional management contractor experienced in procuring and managing works of a similar size, nature, scope and complexity to the Works (or, in relation to functions to be carried out by a provider of railway infrastructure or railway operator, the degree of skill and care reasonably to be expected of a suitably qualified and competent provider of railway infrastructure or railway operator); and
 - (e) in accordance with the terms of this Agreement.

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The standards set out in paragraphs (a) to (e) are in descending order of priority so that in the event of any conflict between two or more of such standards Network Rail's obligation will be to act in accordance with the standard listed higher above.

9. If Network Rail becomes aware of any matter which will prevent or impede it from performing the obligations on its part in this Agreement or will prevent or impede any works contractor from carrying out the Works, Network Rail shall so notify the Customer promptly and in any event within five Business Days after becoming so aware.
10. The Customer shall ensure that any information or instructions provided to Network Rail by or on behalf of the Customer are prepared and given in such a diligent and professional manner and with such clarity and in such detail as is necessary for Network Rail to comply with its obligations under this Agreement.
11. Network Rail shall be the sole 'client' for the purposes of the Construction (Design and Management) Regulations 1994.
12. Any variations to the Works shall only be effective if agreed by both parties in writing, provided that Network Rail shall be permitted to carry out any variation without the Customer's consent (but subject to prior consultation with the Customer where practicable) if:
 - (a) the individual cost of each such variation does not exceed £10,000, the aggregate cost of such variations does not exceed £40,000 (or such other sum as may be agreed) and Network Rail reasonably considers that there will be no material impact on the scope of the Works or the Implementation Programme; or
 - (b) it is necessary to vary the scope of the Works due to unforeseen site conditions; or
 - (c) it is necessary to vary the scope of the Works due to any statutory or contractual obligation as at the date of this Agreement for Network Rail to carry out works in relation to any land or asset owned by Network Rail; or
 - (d) it is necessary to vary the scope of the Works due to any change in any legal requirement which applies expressly to:
 - (i) the railway industry, a particular section of the railway industry or the provision of services to the railway industry and not to other transport modes or industries; or
 - (ii) the Works or a works contractor appointed by the Customer in relation to the Works, and not to other works or other contractors; or
 - (e) it is necessary to vary the scope of the Works due to any change in Standards for safety reasons which comes into effect after the Project has passed GRIP Stage 4; or
 - (f) it is necessary to vary the scope of the Works in order to avoid, address or alleviate a Network Operation Issue (as defined in paragraph 13);subject to paragraph 14 in the case of paragraphs (c), (d), (e) and (f), and provided that:
 - (i) the scope of such variation shall only be that which is necessary in the circumstances; and
 - (ii) Network Rail shall as soon as reasonably practicable inform the Customer of such additional costs and impact on the indicative programme (if any) and shall meet with the Customer to review the same.
13. For the purposes of this Agreement '**Network Operation Issue**' means:
 - (a) any safety critical event, which means a risk to the health and safety of any individual or risk of damage or destruction to any property or any incident which may reduce the safety integrity level of any item of infrastructure;

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- (b) any operational emergency, which means any situation or circumstance which Network Rail reasonably considers requires immediate or urgent action in order to maintain or restore the effective operation of the network or any part of it;
- (c) any legal requirement (to the extent that it applies to a party to this Agreement, including any judicial interpretation which changes the effect of such a legal requirement);
- (d) any requirement of the network licence;
- (e) any contractual commitment of Network Rail existing on or prior to the date of this Agreement; or
- (f) any requirement to utilise the original copy held by a contractor of any relevant approved engineering record, drawing or any other document in respect of the Network, which is immediately necessary to address an issue arising under any of paragraphs (a) to (e) above;

provided that in each case:

- (i) Network Rail acts reasonably (but in its sole discretion in respect of its statutory obligations or safety issues);
- (ii) such issue affects or is affected by the Works; and
- (iii) in the case of paragraph (e), Network Rail has used its reasonable endeavours to notify the Customer before signing this Agreement as to whether there are any such commitments which are likely to conflict with the Works.

14. Without prejudice to paragraph 6 of this Agreement, Network Rail shall bear all direct costs reasonably incurred by the Customer (unless such costs are below £10,000 in aggregate) as a result of:

- (a) any delay to the Works which is caused by a Network Operation Issue;
- (b) any interference with the Works which is caused by another contractor on an interfacing project;
- (c) any booked possession being cancelled or altered (including as a result of any default by any train operator); and/or
- (d) a variation being implemented in accordance with paragraph 12(d) or (e)

except to the extent such costs are incurred due to the negligence, breach or default of the Customer or any contractor appointed by the Customer (other than Network Rail).

If Network Rail is able to recover compensation from a third party in relation to the events described in paragraph 14 (a) to (d) above, it shall account to the Customer for all such compensation so received (to the extent that such compensation relates to the Customer's direct costs).

15. Network Rail shall bear all direct costs reasonably incurred by the Customer in respect of any Existing Asset Obligation. For the purposes of this Agreement **'Existing Asset Obligation'** means any statutory or contractual obligation as at the date of this Agreement for Network Rail to carry out works in relation to any land or asset owned by Network Rail.
16. Network Rail shall own the Works upon their completion and the Customer agrees to reimburse Network Rail all additional operation, maintenance and renewals costs that may arise for Network Rail as a result of the Works (unless and until Network Rail is able to recover such costs by virtue of an adjustment to relevant access charges as a consequence of the implementation of an access charges review (as defined in the Railways Act 1993) or those costs are otherwise reimbursed by a third party.
17. Network Rail hereby grants to the Customer a non-exclusive, royalty-free licence to use (solely for the purposes of the Project) any intellectual property which is owned by Network Rail and provided by Network Rail pursuant to Part 1 of the Schedule.

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Network Rail shall use its reasonable endeavours to procure the grant to the Customer of a similar licence to use any intellectual property rights which are provided by Network Rail pursuant to Part 1 of the Schedule and owned by any third party. Save as aforesaid the Customer shall not acquire any intellectual property rights as a result of this Agreement or the Works.

18. Network Rail shall invoice the Customer in accordance with the payment provisions set out in Part 1 of the Schedule. The Customer shall pay each invoice in full within 20 Business Days from receipt of the invoice. If the Customer wishes to dispute the amount set out in an invoice, it shall notify Network Rail within 10 days of delivery of the invoice specifying the disputed amount and the grounds on which it claims that such amount is not due and payable. Late payment of any amount due and payable under any invoice shall carry interest from the due date to the date of payment at the rate of 2% above the base rate of HSBC Bank plc from time to time. All amounts are exclusive of Value Added Tax, which will be charged at the applicable rate.
19. Save as otherwise expressly provided in this Agreement, neither Party shall be liable in respect of any breach of any of its obligations under this Agreement (other than under paragraph 18, 25(e) or 28(c)) unless the aggregate amount of all claims for which the respondent would otherwise be liable to the claimant exceeds £10,000.
20. Except in relation to fraud or negligence, the maximum liability of Network Rail to the Customer arising out of or in consequence of this Agreement or the carrying out of the Works (whether for breach of contract, in tort, for breach of statutory duty or otherwise) shall in all circumstances be limited in aggregate to the sum of:
 - (a) an amount equal to 300% of the Network Rail Fee (as defined in Part 2 of the Schedule); plus
 - (b) the amount of any compensation actually recovered by Network Rail from any third party (if and to the extent that such compensation relates to loss suffered by the Customer and not by Network Rail itself).
21. Notwithstanding any approval, consent, comment, confirmation or advice which Network Rail may provide pursuant to this Agreement, the responsibility for the design of the Works shall remain solely at the risk of the Customer save to the extent such liability is assumed by any works contractor under the terms of any works contract or by any consultant.
22. The Customer's aggregate liability to Network Rail in respect of this Agreement shall not exceed an amount equal to 10% of the estimated Project Cost (as defined in Part 2 of the Schedule), provided that such limitation shall not apply:
 - (a) to the Customer's payment obligations under paragraphs 7, 16, 18 or 28 or Part 2 of the Schedule;
 - (b) to any liability in respect of the fraud or negligence of the Customer or of any contractor or consultant appointed by the Customer (other than Network Rail); or
 - (c) to any costs or losses in respect of which the Customer is entitled to recovery from its insurers (or would be so entitled but for the Customer's own default) and for these purposes the entitlement of the Customer to recover shall be deemed not to be affected by this paragraph.
23. In no circumstances shall Network Rail or the Customer be liable to one another in respect of this Agreement for any indirect or consequential loss (including loss of profit) howsoever arising (without prejudice to any express payment or indemnity obligation of either Party under this Agreement).
24. The Parties agree that damages may not be an adequate remedy for any breach of this Agreement and the Parties shall be entitled to seek the remedy of an interdict, interim interdict or other equitable relief (without prejudice to paragraph 5) provided that Network Rail shall not be required to rework any Services or take any action where:

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- (a) Network Rail considers, at its sole discretion, that to do so could conflict with its statutory obligations or undertakings as network operator, including its safety case obligations; or
 - (b) the Customer has not confirmed that it will meet the costs of any rework or further action where such costs exceed Network Rail's limit of liability in paragraph 20.
25. Subject to paragraph 22, the Customer shall indemnify Network Rail and keep Network Rail indemnified against any costs and losses resulting from:
- (a) claims against Network Rail by any third party in relation to the carrying out or the procuring of the carrying out of the Works;
 - (b) any of the Customer's obligations or duties under this Agreement being or becoming void, voidable, unenforceable or ineffective due to lack of capacity on the part of the Customer;
 - (c) the use of any intellectual property rights by the Customer or any sub-licensee other than for the purposes of the Project;
 - (d) the use by any other person of any other documentation or information provided by Network Rail to the Customer; and/or
 - (e) any claim against Network Rail for common law nuisance or pursuant to the Land Compensation (Scotland) Act 1973 as a result of the Works (in the case of claims relating to the Network, up to a limit of £10,000.

except to the extent that the same arise due to the negligence of Network Rail.

In respect of any costs and losses subject to the indemnity in this paragraph, Network Rail shall take all reasonable steps to prevent, mitigate and restrict the circumstances which have given or may give rise to such costs and losses.

26. Either Party may by serving notice on the other party terminate this Agreement with immediate effect if the other Party is in material breach of this Agreement (provided that the Party wishing to terminate shall first notify the other Party of any remediable breach and its intention to terminate, and shall allow the other party a period of 20 Business Days to remedy such breach). Either Party may terminate this Agreement with immediate effect by serving notice on the other party if the other Party becomes insolvent.
27. The Customer may terminate this Agreement by giving 20 Business Days' written notice to Network Rail if:
- (a) the latest estimated duration of the Works is more than 25% longer later than the original Implementation Programme (adjusted for any agreed variation); or
 - (b) the latest estimated Project Costs are more than 25% greater than the Estimated Project Costs (adjusted for any agreed variation); or
 - (c) any material external source of funding for the Project is withdrawn
- unless the same is due to the negligence or breach of the Customer
28. Upon termination, all obligations of both parties under this Agreement shall cease except for:
- (a) the provisions of paragraphs 17 and 29;
 - (b) any obligations arising as a result of any antecedent breach of this Agreement or any accrued rights; and
 - (c) the obligation of the Customer to pay Network Rail for:
 - (i) any unpaid Works as at the date of termination; and
 - (ii) (except where termination is due to Network Rail's default or insolvency) the costs and expenses reasonably incurred by Network Rail in terminating this Agreement (including removal of all plant, equipment and those materials not

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incorporated into the Works and reinstatement of the Works (or such part thereof as may exist as at the date of termination) and the relevant part or parts of the Railway affected by the Works to the extent necessary to (i) make the same safe and/or secure; and/or (ii) enable Network Rail to meet its contractual, statutory and network licence obligations (including the reasonable cost of any contractors and compensation to third parties). The decision to make good the site and/or complete the Works (or part of them) shall be discussed with the Customer but shall be the final decision of Network Rail.

29. Neither Party shall disclose any confidential information save as required by any enactment, requirement of any regulatory authority or pursuant to any judicial or arbitral process, or in the case of Network Rail as required by its statutory duties or network licence. On termination of this Agreement, the Customer shall either destroy or, if reasonably requested to do so, return any confidential information within its possession or control that belongs to or was provided by Network Rail.
30. Either Party may refer to adjudication any dispute arising out of or in connection with this Agreement in accordance with the Scheme for Construction (Scotland) as set out in the Scheme for Construction (Scotland) Regulations SI No. 687 of 1998. The adjudicator shall be agreed by the Parties and failing agreement within five working days of receipt by one Party of a proposal by the other the adjudicator shall be appointed at the request of either Party by the President of TECBAR.
31. Any notice pursuant to this Agreement shall be in writing and shall be duly and validly served if delivered by hand or sent by first class post to the registered office of the relevant Party. Any notice sent by post shall be conclusively treated as having been served two working days after posting.
32. Neither Party may assign or charge its rights or interests under this Agreement without the prior written consent of the other Party (not to be unreasonably withheld or delayed).
33. No rights shall be conferred under or arising out of this Agreement on any person other than the Parties to this Agreement and there shall not be created in any circumstances a jus quaesitum tertio in favour of any person.
34. No amendment to or variation of this Agreement shall be effective unless in writing and signed by or on behalf of each Party. No general terms and conditions contained in any purchase order or other document customarily required by either Party in connection with a request for works or services shall be binding on the Parties.
35. This Agreement constitutes the entire agreement between the parties relating to the subject matter of this Agreement and supersedes any previous agreements between the Parties. Each Party acknowledges that in entering into this Agreement it is not relying upon any statement or representation not set out in this Agreement.
36. If either party is or becomes a public authority under the Freedom of Information Act 2000 or the Freedom of Information (Scotland) Act 2002, all regulations made under it, and the Environmental Information Regulations 2004 and the Environmental Information (Scotland) Regulations 2004, and any amendment or re-enactment of any of them, including any guidance issued by the Information Commissioner, Scottish Information Commissioner, the Department for Constitutional Affairs, and DEFRA in relation to such legislation (the 'Information Acts') and receives a request under such Information Acts for information relating to the Project, it shall comply with any such request only if none of the exemptions from disclosure in such Information Acts applies, and if it is in doubt whether any such exemption applies it shall inform the other Party of the request as soon as possible and shall consult with the other Party as to the potential application of any exemption. For the purposes of section 43(2) of the Freedom of Information Act 2000 and section 33 of the Freedom of Information (Scotland) Act 2002 and any similar provisions under any of the Information Acts, the Parties acknowledge and agree that the disclosure of any commercially sensitive

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Information relating to the Project is likely to prejudice the commercial interests of the parties.

37. This Agreement shall be governed by and construed in all respects in accordance with the laws of Scotland and each of the Parties to this Agreement hereby prorogates to the exclusive jurisdiction of the Scottish courts as regards any claims or matter arising hereunder. This Agreement consists of this page and the preceding 7 pages together with the Schedule extending to 2 parts annexed to this Agreement.

Yours faithfully

Signed:.....

duly authorised for and on behalf of Network Rail Infrastructure Limited

We agree to the above.

Signed:.....

duly authorised for and on behalf of the Limited.

Dated:.....

26/12/08

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This is the Schedule in 2 parts referred to in the foregoing Basic Implementation Agreement (Emerging Costs) among Network Rail Infrastructure Limited and the Limited

SCHEDULE

Part 1 - The Works

A. Works Requirements

In design of the Edinburgh Tram Network (ETN), potential conflict between the proposed Tram infrastructure and existing Network Rail infrastructure was identified in a report prepared by consultants for the Customer. Under a Development Services Agreement of 5th December 2007, the Customer commissioned Network Rail to fully scope the work required to modify Network Rail's services and equipment to allow for construction of ETN, particularly in the area between Haymarket and Carrick Knowe.

Network Rail commissioned a survey and identified equipment that will require to be relocated.

The scope of the works has been identified as follows:

Relocate the following points heating equipment to the opposite side of the track (East Coast North and Edinburgh to Glasgow lines):

- Existing DNO Kiosk and equipment at 2m 843 yds on UP line cess. To be replaced by a new kiosk on the fenceline on Balgreen Road side of U/B 8.
- Existing PHCC and equipment at 2 m 840 yds on UP line cess. To be replaced by new PHCC at same mileage on the Glasgow-Edinburgh down main cess. Telemetry Equipment to be relocated to new PHCC.
- Existing transformers on the UP line cess at the following locations to be relocated to the same mileage on the DOWN cess:
 - o 2m 737 yds (transformer TX33- 201B points)
 - o 2m 758 yds (transformer TX34- 202A points)
 - o 2m 814 yds (transformer TX35- 198B points)
 - o 2m 830 yds (transformer TX36- 203A points)
 - o 2m 897 yds (transformer TX37- 203B points)
 - o 2m 905 yds (transformer TX38- 202B points)

Route of mains cable rising from pathway and clipped to U/B 7 to be traced (subsequent re-routing may be required).

Route of cable suspended across U/B 6 to be traced (subsequent re-routing may be required).

Route of telecoms cables to be traced at the UTX at 2m 850 yds (subsequent re-routing may be required).

Related cabling associated with relocated equipment to be renewed.

Works to include arrangement of appropriate power supply at new locations

Scope to include design work associated with the Works.

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B. The Implementation Programme

The programme of works will be as follows:

Commence design work- 18th February 2008.

Commence on site- 24th March 2008.

Complete on site- 27th April 2008.

C. Payment Schedule

Payments shall be made against invoices issued by Network Rail on a 4 weekly basis which shall be in line with Network Rail's accounting periods.

D. Deliverables

The deliverables for this Agreement shall be the relocation of the point heating and related equipment in the required locations and tracing and potential re-routing of cables.

SCHEDULE

Part 2 - Network Rail Costs

1. DEFINITIONS

The following terms shall have the following meanings when used in this Schedule:

'Agency Costs' means the cost to Network Rail of any Agency Personnel engaged in connection with the Works multiplied by 1.5, plus the properly incurred expenses and disbursements charged to Network Rail by such Agency Personnel;

'Agency Personnel' means those personnel who have entered into a contract for services with Network Rail to provide services in connection with the Works exclusively to Network Rail;

'Business Day' means any day (other than a Saturday or Sunday) on which banks are open for business in Scotland;

'Consultants' and Contractor Costs' means the costs to Network Rail of any consultants or contractors engaged by Network Rail in connection with the observance and performance of its obligations under this Agreement, plus the properly incurred expenses and disbursements of those consultants or contractors;

'Expenses and Disbursements' means the items referred to in paragraph 2.2;

'Fee' means an amount equal to the Network Rail Fee plus the Industry Risk Fee;

'Freight Access Agreement' means any agreement entered into between Network Rail and a train operator for the movement of freight trains incorporating the Network Code;

'Hourly Rate' means in respect of each member of Network Rail's Personnel in any particular role band the rate set out in paragraph 3 as the same may be adjusted from time to time in accordance with paragraph 4, which rate will be payable in respect of all worked hours spent by Network Rail's Personnel in connection with the Works;

'Industry Risk Fee' means an amount equal to 2% of the estimated Agency Costs, Consultants' and Works Contractor Costs and Personnel Costs as at the date of this Agreement;

'Network Rail Costs' means Agency Costs, Consultants' and Contractor Costs, Expenses and Disbursements, Fee, Personnel Costs and Possessions-Related Costs, plus

- (a) costs associated with applying for or as a consequence of any necessary consents in relation to the Works; and
- (b) such other costs, expenses and liabilities which are properly incurred by Network Rail in respect of the performance of Network Rail's obligations in respect of the Works

to the extent that they arise from or are a consequence of the Works;

'Network Rail Fee' means an amount equal to 5% of the estimated Agency Costs, Consultants' and Works Contractor Costs and Personnel Costs as at the date of this Agreement;

'Network Rail's Personnel' means any employees and/or officers of Network Rail;

'Personnel Costs' means the sum of the relevant Hourly Rate multiplied by the number of hours spent by each member of Network Rail's Personnel in connection with the performance of Network Rail's duties and obligations under this Agreement;

'Possessions-Related Costs' means sums Network Rail will be obliged to pay to any train operator pursuant to Schedules 4 and/or 8 of the relevant Track Access Agreement or, where such train operator is party to a Freight Access Agreement, the equivalent provision of that agreement;

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'Project Cost' means the total estimated costs of the Project up to the completion of the Project, including construction costs, Customer costs, contractor costs, Network Rail Costs and contingency; and

'Track Access Agreement' means any agreement entered into between Network Rail and a train operator for the movement of passenger trains incorporating the Network Code or any access option in relation to the movement of passenger trains on the Network.

2. PAYMENT OF COSTS

2.1. The cost estimate for the Works is detailed below:

Lift and Shift Implementation Works		N/R Costs to Deliver		
Design, delivery and project management of lift and shift works under a Basic Implementation Agreement				
		Total Hrs	FDA Rates	
Role	Description		Rate (£)	TOTAL (£)
Senior-Commercial Scheme Sponsor	Customer interface and contract management	20	77.16	1,543
Route Enhancements Mgr	Oversee customer relationship	5	104.94	525
Project Manager	Project manage development activities	15	57.41	861
Scheme Project Manager	Project & site activities	40	40.12	1,605
Project Engr (Telecoms)	Review telecoms impact	10	57.41	574
Project Engineer (E&P)	Review & supervise E&P work	20	57.41	1,140
Maintenance Engineer	Review work & update asset records	25	57.41	1,435
Territory Engr (E&P)	Approve proposed solutions	10	57.41	574
Commercial Mgr	Manage commercial processes	10	40.12	401
Commercial Asst	Inputs to commercial processes	20	32.10	642
Planner	Inputs to planning system	10	40.12	401
Senior Buyer	Procure implementation works	10	57.41	574
Programme Controls Mgr	Oversee planning inputs	5	57.41	287
Safety Mgr	Compliance with NR safety procedures	10	40.12	401
Total Salary Costs				10,972
Design of Lift and Shift Works	Quotation from Jarvis Rail			20,000
Delivery of Lift & Shift Works	Quotation from Jarvis Rail			83,018
Legal Costs				1,000
Possession Costs				3,000
Contingency @ 15% of costs		15%		17,699
GRAND TOTAL				135,689
Network Fee Fund	5% of cost (excluding contingency)			5,700
Industry Risk Fund	2% of cost (excluding contingency)			2,200
TOTAL CONTRACT COST				143,669

2.2. The Customer shall pay or reimburse Network Rail in respect of all Network Rail Costs reasonably and properly incurred by Network Rail in connection with the Works, including:

- (a) printing, reproduction and purchase of documents, drawings, office consumables, maps and records;
- (b) travelling expenses as follows:
 - (i) for journeys by train or airplane by all staff - in accordance with Network Rail's then current personnel policies;
 - (ii) for journeys by the London Underground system - actual costs;

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- (iii) car hire for business journeys other than home to Network Rail's offices - actual costs;
 - (iv) taxi fares - actual costs;
 - (v) additional costs of daily travel costs from Network Rail's offices to the designated project office; and
 - (vi) hotel and restaurant bills and other subsistence expenses associated with such travel including costs on temporary assignments to the Customer, in accordance with Network Rail's then current personnel policies;
- (c) all costs incurred that are associated with consultants, subcontracts and other outside services and facilities to the extent not included elsewhere within this Schedule;
- (d) training courses specifically relating to the Works;
- (e) any VAT chargeable;
- (f) all technical, commercial, professional and legal fees, costs and disbursements in connection with the Works;
- (g) all legal and other costs, charges, and expenses properly incurred by Network Rail in connection with the preparation, negotiation and enforcement of any supplemental leases, licences and other documentation entered into by Network Rail and relating to the Works;
- (h) any sums payable by Network Rail pursuant to:
- (i) Conditions G or H of the Network Code;
 - (ii) any Station Access Agreement, Station Lease or the Station Access Conditions; or
 - (iii) any Depot Access Conditions or any Depot Lease
- where the same arise in connection with the carrying out or completion of the Works or the subsequent operation of the completed Works; and
- (i) any other disbursements or expenses incurred by Network Rail in connection with the Works under this Agreement which are not expressly set forth herein.
- 2.3. For the avoidance of doubt, and notwithstanding the provisions of paragraph 2.2, the Customer shall not be liable in any circumstances for any costs, expenses or disbursements incurred by Network Rail as a result of:
- (a) the negligence of Network Rail; or
 - (b) Network Rail falling to comply with paragraph 8 of the Agreement
- provided that any costs, expenses or disbursements which are irrecoverable by virtue of paragraph (b) above shall be counted towards the cap on Network Rail's liability for the purposes of paragraph 20 of the Agreement.

3. HOURLY RATES

Banding	Non London	London
1	£104.94	£107.65
2	£77.16	£79.88
3	£57.41	£60.12
4	£40.12	£42.84
5	£32.10	£34.82
6	£25.30	£28.03
7	£20.99	£23.70
8	£16.67	£19.38

4. ADJUSTMENT OF HOURLY RATES

- 4.1. Network Rail shall adjust the Hourly Rates from time to time as necessary to reflect actual changes in salary bands and other employment conditions that are made in accordance with Network Rail's personnel policies and salary plans.
- 4.2. Network Rail shall serve written notice on the Customer setting out any adjustment to the Hourly Rate and indicating the date from which the adjusted Hourly Rate will apply which date shall not be less than 20 Business Days after the date of such notice.

5. REVIEW

- 5.1. As from time to time requested by the Customer, Network Rail shall provide to the Customer reasonable access to and evidence and records of all amounts payable by the Customer under this Schedule (other than the Hourly Rates) together with such other information and records as the Customer may reasonably require (having at all times regard for Network Rail's confidentiality and contractual obligations), which may be reviewed and audited by or on behalf of the Customer.

Andy Conway

From: Stewart McGarrity [Stewart.McGarrity@tie.ltd.uk]
Sent: 25 April 2008 13:34
To: Alan Coyle
Subject: FW: SDS - STRICTLY PRIVATE & CONFIDENTIAL

Alan,

Your email system bounced this presumably due to the attachments. How do you want me to get the attachments to you?

Stewart

From: Stewart McGarrity
Sent: 25 April 2008 13:29
To: 'Alan Coyle'
Cc: Steven Bell; Graeme Bissett; Susan Clark; Dennis Murray
Subject: SDS - STRICTLY PRIVATE & CONFIDENTIAL

PRIVATE & CONFIDENTIAL

Alan,

To fulfil your pre-close requirements and to address Donald's letter to Willie of 18th March I am providing chapter and verse on the pre-existing settlement with SDS dating back to September last year of £2.5m (including c£1.0m of changes and like matters) and an additional settlement being proposed at Novation which stands at £450k (including c£250k in respect of changes and like matters). It's important to realise that only a part element of these settlements is in respect of 'claims' and even then these are what I regard as normal commercial settlements rather than disputes requiring recourse to a dispute resolution procedure, adjudication or arbitration.

Note that the negotiated SDS Novation agreement requires us to pay PB full settlement of both these amounts prior to Novation (i.e. next week). Can I ask you to brief Donald on all of this and I'll speak to him next week myself about the extent of briefing required by TIE on these matters.

1. Settlement from Sep 07 (£2.5m of which c£1.0m were changes and like matters)

The paper trail through the approving TPB Papers and Minutes is attached (*SDS claim papers.zip*) as follows:

Page 2 – Period 4 initial SDS claim paper

Page 11 – Discussion of initial SDS claim paper (point 5.0) (Minutes of P4 TPB contained in P5 report)

Page 15 – Period 5 SDS claim paper (approved)

Page 27 – Discussion of approved SDS claim paper (Point 3.8) (Minutes of P5 TPB contained in P6 report)

*numbering related to the pdf document, not the numbers on the pages

Note that the TPB approval on 5/9/07 predates the Council meeting on 20/9/07 when the claims ratification requirement via TIE was introduced but I can well understand wanting to report a historic sweep up on this matter.

2. Settlement at Novation (£450k of which c£250k are changes and like matters)

The current settlement is detailed in the attached word document and is below the £500k bar which requires ratification by the Council.

Cheers

Stewart

21/07/2008

CEC01244182_0599

Stewart McGarrity
Finance Director
tie Limited
Mobile: [REDACTED]

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tie Limited registered in Scotland No. SC230949. Registered office - City Chambers, High Street, Edinburgh, EH1 1YT.

SDS Settlement Proposed April 08

SDS tabled a claim for Additional Management and Supervision Services on 14th January 2008 in the sum of £598,681. In this claim SDS detailed their entitlement to reimbursement of additional costs due to delays as a result of the resolution of a number of critical issues, some involving third party agreements, delays in the provision of information by Statutory Authorities on the Utilities work and delays due to providing additional support for preferred bidder negotiations. The claim assessed the impact on time and cost of prolongation of additional management and supervision services as booked from end November 2007 to 5th January 2008 and estimated further costs from 5th January 2008 to revised completion date. Tie disagreed with many aspects of the claim however it was acknowledged that prolongation had occurred and that SDS would be entitled to some recompense. The claim was responded to by tie by letter on 21st February rejecting it in its then format.

A meeting was held on 19th March 2008 with SDS principal to discuss this claim together with three major Change Orders that were disputed at that time. At this meeting SDS had amended their claim from £598k to £784k by substituting the projected costs in the submitted January version for more updated Actual Cost. This together with the three major Change Requests that were disputed resulted in a discussion to agree a total of £1,078K of disputes (784+204+45+45). No agreement was reached at the meeting of 19th March 2008.

Further discussions were held and at a final meeting on 16th April 2008 a settlement figure on the Additional management and Supervision Services and the three disputed Change Requests was agreed at £450K of which approximately £200k related to prolongation.



Tram Project Board
Report on period 4
Papers for meeting 9th August 2007

09:00am – 12:00pm

Distribution:-

David Mackay (Chair)
Willie Gallagher
Neil Renilson
Bill Campbell
Bill Reeve
Andrew Holmes
Susan Clark (for Matthew Crosse)

Donald McGougan
Graeme Bissett
James Stewart
Alastair Richards
Jim McEwan (for Stewart McGarrity)
Jim Harries
Miriam Thorne (minutes)

a dispute will also delay and disrupt the due diligence process, which is critical to full acceptance of design by the recommended Infraco bidder, which will also delay the Infraco contract award. In the event of a dispute between SDS and **tie**, the Infraco bidders will exclude its resolution and impacts on programme from their deal. It is likely in such circumstances that they would not accept novation until such time that these issues are resolved.

A conventional assessment is likely to be both time consuming and disruptive to the progress of the Project during this critical phase, resulting in distraction in management and delivery time for both SDS and **tie**.

A commercial settlement enables historical commercial issues and changes to be concluded expeditiously and it also create an opportunity to incentivise SDS to complete designs by making part of settlement contingent on achieving key delivery milestones.

Heads of claim

SDS claims to have suffered an increase in costs as a result of:

- I. Changes due to Charrettes with CEC / **tie**
- II. Changes due to additional third party agreements
- III. Changes required by **tie**
- IV. Consents
- V. Changes due to EARL
- VI. Tie's failure to accept and review the preliminary design
- VII. Changes due to third party developer's emerging designs
- VIII. Failure to update the master project programme

However, their entitlement to recompense for these events is contractually less certain due to:

- Terms and conditions set out in the SDS agreement and the extensive obligation on SDS to get "all approvals and consents and manage all the stakeholders".
- The failure of SDS to identify and set out the detailed list of all the critical issues, before end of February 2007.
- The failure of SDS to issue the appropriate notices to **tie** within the specified contract timescales.
- The implications to **tie**, MUDFA / AMIS, Tramco and Infraco of delays to attributable to SDS.
- The fact that the Tram Project suite of contracts are bespoke, one-off contracts and therefore untested, then there is a higher level of uncertainty in the interpretation and resolution of disputes by external third parties than where standard contracts are adopted.
- The fact that SDS did not qualify their bid and contract in respect of the number of design iterations, or assumptions, in respect of stakeholder expectations.

tie's counterclaim is based on breach of contract relating to these areas.

The alternative to a commercial settlement is to enter into dispute with SDS and invoke the contractual dispute resolution process. In the arena of dispute resolution, the outcome decided by third parties is less certain, given bespoke and therefore untested nature of SDS contract.

Summary of Financial Position

SDS Position	
Claim (to 01/06/07)	2.8m
Changes in dispute	1.1m

Total expectation	<u>£3.9m</u>
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tie allowance in cost report	
Allowance for claim	2.2m
Allowance for changes in dispute	0.9m

Total comparable allowance	<u>£3.1m</u>
----------------------------	--------------

Details of the relevant ranges will be presented to a special Board sub-committee (to be arranged).

Proposed basis for settlement.

It is proposed to negotiate a settlement for the claim and disputed changes and include in the settlement a deferral of payment of significant amounts of the agreed sum contingent on:-

- Design deliverables – delivery of design completions and design assured packages to the agreed dates.
- Delivery of the utilities designs to the agreed programme.

Incentives for SDS to settle at a figure acceptable to **tie** are:

- Improved cash flow from early settlement delivered by:
 - Settlement of claim and
 - Settlement within their current accounting year.
- **tie**'s potential counter-claim for delays to **tie**'s overall programme due to:
 - Delay to commencement of Requirements Definition Phase.
 - Delay to commencement and completion of PD.
 - Delays to utilities designs and impact on MUDFA contract
 - Delays to completion of surveys by SDS
 - Delays to **tie**, MUDFA / AMIS, JRC, Infraco, Tramco and CEC
- Charges to SDS contract in respect of:
 - Relaxation of absolute obligation to obtain approvals.
 - Relaxation of run-time obligation

Both of the above are required to align SDS's contract with that of Infraco.

Using the negotiating levers referred to above, a settlement within the range of £2.5m and £3.1m could be achieved, based on the reactions of SDS at initial

meetings to discuss this approach. This being the range within which SDS are likely to accept without invoking dispute resolution.

Programme for settlement

Ideally settlement is required prior to selection of an Infraco bidder for conditional contract award recommendation. This will mitigate some of the Infraco concerns and risks associated with SDS. Therefore, ideally, settlement should be delivered by the end of August 2007. However, if a figure acceptable to **tie** cannot be achieved within this timescale, the backstop date for agreement is the conclusion of Infraco / SDS / facilitated negotiations by 1st October 07.

Decision(s) / support required

It is recommended that the Board authorises a special sub-committee to review the detailed assumptions contained in the claim and counter claim and, subject to this review, to delegate authority to the Project team to negotiate a commercial settlement with SDS within set parameters.

The Board is asked to authorise this paper and to confirm the principles and objectives set out in this paper.

Proposed Geoff Gilbert 27 July 2007
Project Commercial Director

Recommended Matthew Crosse 27 July 2007
Tram Project Director

Approved Date:-
David Mackay on behalf of the Tram Project Board



Transport Edinburgh
Trams for Edinburgh
Lothian Buses

Tram Project Board
Report on Period 5
Papers for meeting 5th September 2007

09:00am – 12:00pm

Distribution:-

David Mackay (Chair)
Willie Gallagher
Neil Renilson
Bill Campbell
Andrew Holmes
Matthew Crosse

Donald McGougan
Graeme Bissett
James Stewart
Alastair Richards
Jim McEwan
Jim Harries
Miriam Thorne (minutes)

Edinburgh Tram Network Minutes

Tram Project Board

09 August 2007

tie offices – Citypoint II, Brunel Suite

Principals		Participants:	
David Mackay	DJM (chair)	Graeme Bissett	GB
Willie Gallagher	WG	Steven Bell	SB
Neil Renilson	NR	Bill Campbell	WWC
James Stewart	JS	Jim Harries	JH
Andrew Holmes	AH	Susan Clark (for Matthew Crosse)	SC
		Jim McEwan	JMcE
		Alastair Richards	AR
		David Crawley (part)	DCr
		Miriam Thorne (minutes)	MT

Apologies: Bill Reeve, Donald McGougan, Stewart McGarrity

1.0	REVIEW OF PREVIOUS MEETING	Action
1.1	The previous minutes were taken as read.	
2.0	Other matters arising	
2.1	DJM advised the board that TS would not attend the meeting. A letter to that effect had been sent to Tom Aitchison to advise CEC and the TPB of their intention to resign from the Board in anticipation of the finalisation of the new governance arrangements for the Tram project.	
2.2	WG requested that the TPB considered the critical issue of Network Rail immunisation – see section 6.0 below.	
3.0	Financial Close Delivery Programme	
3.1	GB provided a presentation, together with a detailed background paper, on the proposed approach and programme to Financial Close, covering governance, risk, funding and approvals issues. The ensuing questions and discussions are outlined below.	
3.2	DJM requested that a copy of the presentation and supporting paper was sent to Tom Aitchison.	GB
3.3	<u>Funding</u>	
3.3.1	DJM queried if the announced funding of £500m for Phase 1 was now confirmed, i.e. no longer subject to further indexation calculations. GB confirmed this was the information received from TS, subject to written confirmation, which would follow.	DS / GB
3.3.2	WG confirmed that feedback from TS was that the project did not need to accommodate any “future proofing” against EARL or similar projects in terms of design or operational planning.	

3.3.3	JS questioned whether the bidders were fully aware of the changed funding arrangements and whether they still requested a letter of comfort. He explained that, in his experience, matters relating to covenants, timing of approvals and authorities to approve, often delay progress at the last minute, despite previous indications that they were resolved.	
3.3.4	WG proposed that he would write to the bidders, outlining the current funding position and obtain feedback about whether this is sufficient.	WG
3.3.5	GB stated that the assumed split of funding is approximately 90%TS – 10% CEC funding, with matched timing of contributions. The detail of the funding drawdown is in the process of being resolved and no significant issues are expected to arise. A draft New Award Letter was expected by the 14 th August.	
3.3.6	JS questioned the impact on affordability of further delays to the project. He expressed concern that the current time pressures may lead to a less than optimal deal being struck. WG confirmed that the project team was evaluating the impact of any delay in bidder selection against the costs and programme at each stage of the negotiations.	
3.3.7	GB noted the impact of any delays in the procurement programme on the approvals processes. Therefore sufficient alternative dates for approvals and a certain amount of flexibility by members and stakeholders were required to support the project.	
3.3.8	WG confirmed that the deadlines were deliberately kept tight but the TPB recognised that the programme would change if significant opportunities to strike a better deal arose. WG explained that the project was still a number of weeks away from being clear on whether a programme shift should be recommended – greater clarity would be available to the TPB on the 5 th Sept.	MC
3.4	<u>Contingencies</u>	
3.4.1	The Board discussed in detail the feedback received from TS on the matter of contingencies, as provided in the detailed paper. Key issues and discussions are outlined below.	
3.4.2	TS position is that £500m is the maximum grant provision and that it would not accept liabilities arising from political actions which impacted on programme or costs. The only exception would be where TS reneged on any of the conditions set out in a grant letter. This could potentially pose a significant risk for CEC, depending on the timing of the action. AH stated that a discussion was required at higher political level to address this matter. Further, additional allowances should be made for such risks via the risk register.	AH / GB
3.4.3	NR queried what would happen to the cash contributions collected by CEC under s.75. AH explained that these could be generally used for public transport provisions. However, the risk of a challenge to CEC depended on the timing of any decision about Tram termination.	
3.4.4	GB explained that TS will not underwrite the risk that Network Rail may frustrate project progress. However, TS will use their best endeavour to support the project in its interface with Network rails (see section 6.0 below).	
3.4.5	AH questioned what risks in relation to BAA were foreseen in relation to project – SC to provide details on the range of risks and options for mitigation	SC

3.4.6	NR explained that the risks to CEC / TEL from Government actions impacting Tram is twofold: a) Actions impacting on business revenues: these are seen as business as usual and will be addressed through operational adjustments, b) Actions impacting on operational performance, e.g. through the introduction of a heavy rail link to the airport: this is considered low risk as a materially different scheme to EARL would require parliamentary powers.	
3.5	<u>Funding pre-Financial close</u>	
3.5.1	GB outlined the requirement for additional funding prior to financial close to permit the project to proceed with its approved programme. The level of funding for commitments is estimated to be a net maximum £12m, which included allowances for risk, advance works and limited mobilisation of the preferred bidders to ensure the construction programme can be met.	
3.5.2	He explained that even without these elements, the project is likely to run out of sufficient funding prior to financial close, as the grant of £60m had been based on a forecast to Oct 07. Further, neither the current grant, nor the estimated £12m, included allowances for settlement of the SDS claim or programme delays. The project was therefore seeking Board approval to obtain commitment for additional working capital funding from TS to ensure it had appropriate resources available to fund commitments and contingencies.	
3.5.3	The Board agreed that an informal approach should be taken initially: based on further detailed scrutiny of the requirements and discussion at the Procurement Board Sub-committee, GB is to discuss the matter with DS on 15 th August.	GB
3.5.4	If absolutely necessary WG / DJM stated they would support a direct approach to Malcolm Reid / John Swinney.	WG/ DJM
3.6	<u>Governance</u>	
3.6.1	GB confirmed that the planned OGC 3 gateway review, to be arranged for late Sept / early Oct would be commissioned on behalf of CEC, not TS. However, it would require to confirm that any hold issues from previous OGC reviews were now resolved. The Board approved this approach.	GB – confirmed all previous issues resolved
3.6.2	The Board discussed whether the approvals sought in Sept / Oct should be for 1a only or 1a and 1b combined but on a phased basis. It was recognised that sufficient funding headroom will be required in either case in the final analysis.	
3.6.3	WG highlighted that the Infraco bidders both offered attractive discounts for concurrent construction of Phases 1a and b, whereas any phasing was likely to incur additional premia as efficiencies are lost. The option to commission Phase 1b would remain open in the bids until spring 2009.	
3.6.4	AR highlighted that the costs for Phase 1b will increase on a progressive basis, depending on the timing of any decision. This means that an early decision to proceed is likely to be cheaper than delaying the decision until Spring 2009.	
3.6.5	The Board again agreed that the application of available funding would focus on phased delivery. Any funding gap to achieve delivery of Phase 1b was a matter for CEC to resolve. However, AH confirmed that there is	

	no level of uncertainty around CEC's contribution of £45m. (see 13.0)	
3.7	<u>Approvals</u>	
3.7.1	JS questioned if the approval of the FBC version 1 by CEC and TS in Oct 07 would effectively represent approval of contract award and final funding. GB confirmed this was not the case: the documents for approval in Sept / Oct 07 will be based on substantially completed information and support the recommendation for the preferred bidders. However, these would not constitute legally binding documents and, therefore, not prejudice the final FBC and contract award approvals.	
3.7.2	GB outlined the requirements by TS to support the programme to financial close and contract award and the FBC as follows: <ul style="list-style-type: none"> - Satisfaction that the Leith to Airport tramline will be delivered - Confirmation that the BCR for this tramline remains above 1 - Confirmation that no government subsidies will be required for the integrated bus and tram operations. 	
3.8	<u>FBC</u>	
3.8.1	The proposal for preparation of the FBC was accepted as presented.	
3.8.2	DJM confirmed that progress was being made on the assumptions that concessionary fares would be available to trams at the same level as for buses.	
3.8.3	GB confirmed that a "road – map" of changes from the DFBC to the FBC would be presented to the TPB prior to approval.	GB / MT
3.9	<u>Governance and Reporting</u>	
3.9.1	GB confirmed that under the changed governance arrangements, all engagement from TS would be directly with CEC, not tie or TEL. This engagement would consist of continued 4-weekly reporting in the current format, 4-weekly meetings between TS (likely Bill Reeve / Jerry Morrissey) and CEC (AH / DMcG) with tie / TEL support and quarterly high level meetings between Malcolm Reid and Tom Aitchison on a wide range of issues.	
3.9.2	The Board considered whether the decision to withdraw from the TPB may be politically motivated. However, JS pointed out that this was the same approach as applied by the DfT in England.	JS
3.9.3	All TPB members agreed that there would be no material changes prior to financial close in the structure of the TPB or interfaces between CEC and tie / TEL.	
3.9.4	WG explained that following TS' decision to withdraw from the tie board as well, and combined with the winding up of tie 's other projects, a review would be undertaken on the role of tie board members on Tram.	
3.9.5	GB stated that the FBC would address the shape of governance post financial close, which will require greater codification of the legal relationships between CEC / tie / TEL and contractors / legal advisors. GB – post meeting note: the enhanced codification is focused on the relationships between CEC and its subs effective as of now. The contracts will deal with the relationships with advisors.	
3.9.6	AH explained that no details of the 4-weekly or quarterly meetings had been clarified at the time of the TPB and that he would share these with the Board as they became apparent.	

3.9.7	DJM stressed that there would be no additional reporting in relation to these arrangements. GB confirmed last remaining concerns around any outstanding matters on reporting to TS were being addressed in a meeting on 14 th Aug.	Feedback requested from TS
3.9.8	The Board recognised that, in order to achieve the tight timescale, a fully integrated approach would be required from teams within CEC / tie / TEL. This included free flow of information between teams and no micro-management / man-marking by any side. DJM requested that any such problems should be directly escalated to the TPB.	
3.9.9	WG stated that the monthly meetings held between AH, WG, Gill Lindsay and Jim Inch supported the resolution of any issues and assisted in identifying resource and timescale requirements.	
3.9.10	DJM welcomed this approach and requested that details of how the interaction between CEC / tie / TEL would work to be reported to the TPB.	AH
3.9.11	AH went on to highlight the need for greater support from tie / TEL to provide information to the Councillors. As part of this information flow, a paper would be presented to Council on 23 rd August, advising Councillors of the changed roles of TS and impact on risk profile for CEC. DJM requested that the paper should be visible to the TPB – AH confirmed he would provide a draft as soon as possible	AH – Done
3.9.12	JS queried how approval would be achieved for continued spend. GB stated that the current profile for spend of the existing grant of £60m was subject to the detailed grant letter and thus no further approvals would be required. Additional spend will be subject to the New Award Letter, which will take account of the revised governance arrangements.	
4.0	Procurement update.	
4.1.1	WG provided feedback from the recent meeting with the Infraco bidders. He confirmed that both bidders were keen to win the business, and had identified a number of possible opportunities to shorten programme and provide discounts for concurrent construction of Phases 1a and 1b.	
4.1.2	SC presented a summary of procurement progress. She reinforced that, all things being equal, the team's focus was to achieve the deadline of August 24 th to conclude, negotiations. Further, she explained that the quality of the bid and associated prices had significantly improved for one bidder. Work is continuing to evaluate all bid information.	
5.0	SDS – claims settlement	
5.1	The proposal for settling the SDS claim was discussed as per the paper provided. The board felt that although it agreed with the approach to a commercial settlement in principle, it required much more detail to support the proposal.	
5.2	WG stated that discussions with the bidders indicated that design was in parts beyond what they would require / use, thus there was perhaps an opportunity to refocus SDS on critical items only.	
5.3	Based on this information, the board recommended that the project revisited the paper and also considered the likely impact of orderly settlement with SDS. The board agreed that this process could be initially addressed within the Procurement Board Sub-committee.	MC / GG

6.0	Network Rail (NwR) – Immunisation	
6.1	WG explained that following TS decision not to manage immunisation for the project, he and SB met with NwR at director level. Key points for concern are as follows: <ul style="list-style-type: none"> - Lack of a technical solution which is acceptable to all parties - Uncertainty about the split of responsibilities between tie / NwR - Lack of clarity around payment mechanisms, as the original approach to use the existing framework agreement for Airdrie-Bathgate was no longer an option. 	
6.2	The Board expressed its dissatisfaction with the lack of progress made on this issue and that no indication that these issues were outstanding had been received by TS. WG confirmed to the Board that appropriate engagement had now taken place directly between tie and NwR and resource with sufficient expertise in the field was being recruited.	
6.3	WG also requested support from PUK in discussions with NwR to ensure the matter remained high on their agenda. SB / JS to discuss	SB
6.4	WG stated that the main impact is that NwR's programme is several years behind the requirements for Tram. Immunisation is on the critical path for the project to achieve Tram energisation and thus meet its completion dates. He also explained that there are options to amend the scope of the works and that alternative solutions were being investigated.	SB
6.5	AR questioned whether the risk could be passed to Infraco. However, the Board thought this was unlikely as Infraco would also have no means of controlling the risk, therefore a high premium would be attached to such an attempt. A paper detailing the proposed way forward on all of the above, including the impact on risk for CEC and approval issues will be presented to the next TPB.	SB / WG
6.6	The board requested that the Risk Register should be amended to take account of these new risks	SB
7.0	Value Engineering	
7.1	JMcE presented an update on the current status of the VE exercise. He explained that some VE items were already contained within the bids, whereas others will be presented as below the Infraco price line, in terms of affordability analysis. He confirmed that the project monitored these items to ensure there is no double counting.	
7.2	Regarding timings, JMcE stressed that not all VE opportunities are required to be fully realised by the time of commercial close to achieve affordability.	
7.3	The TPB appreciated the progress made on VE and requested that future progress should be provided in terms of percentage achievements, with details being discussed at project level meetings.	
7.4	AH raised a concern on the impact of the tight timescales on stakeholder engagement. He stressed that some items have to be subject to planning committee approvals, which cannot be guaranteed, and therefore sufficient review time must be available. JMcE stated that these considerations are being taken into account and that any items for which approval could not be achieved would constitute a change control to the Infraco bid.	

8.0	DPD / MUDFA / SDS / Key milestone update *	
8.1	SB / SC presented a high level summary of the DPD, MUDFA sub committee and SDS progress as per the project directors progress report. No additional matters arising. <i>*a presentation of the summary was handed out at the TPB</i>	
9.0	EICC	
9.1	The paper on CEC's request for utility diversions to be undertaken under MUDFA management was considered. WG explained the team felt comfortable that this additional work would not be a distraction and it suited the timescales for utility diversions in the Haymarket area. This would be separately funded by CEC.	
9.2	SB stated that work was ongoing to ring fence resources, costs and programme for this piece of work. The TPB approved the proposal.	
10.0	Greenways	
10.1	The TBP took the paper as read and approved its recommendation.	
11.0	Sign-off criteria	
11.1	JS requested clarity on what sign-offs will be required to move to preferred bidder for Infraco and Tramco. WG to address.	WG
12.0	Wider area impacts	
12.1	WG updated the board on a meeting between tie / CEC / TEL on this matter. A number of areas had been identified as potential future hotspots. However, insufficient information is available to quantify these	
12.2	NR confirmed that although there may be hotspots, the review showed not significant "red flags" arising. Most of the impacts are therefore likely to be manageable through minor measures, such as signal timings.	
12.3	The agreed approach was that Tram will continue to input into reviews and CEC will make appropriate budget allowances	
13.0	Funding – CEC contribution	
13.1	JS questioned whether there was any risk to the project's affordability arising from uncertainties around CEC contribution of £45m	
13.2	AH affirmed that, although there were risks within CEC's technical issues of realising contributions from developers, measures are taken to mitigate these – e.g. through a review of the contribution policy and an assessment of the costs of prudential borrowing. However, overall CEC remained totally committed to its contribution of £45m. 4-weekly progress reports would be provided to the TPB henceforth as a matter of course.	AH / DMcG

14.0	AOB	
14.1	AH raised the matter that the "Open for Business" retail group had previously requested more senior management focus from tie / CEC. NR stated that Ian Coupar, Donna Reid and Mike Connelly were managing the issues with detailed options being presented to the group. No negative feedback had been received from this recent meeting.	

Prepared by Miriam Thorne, 21 August 2007

**Edinburgh TRAM Project
(Commercial In Confidence)**

tie Limited

Paper to : **Tram Project Board**

Subject : **SDS Commercial Settlement On Claim and Historical Changes**

Date : **5 September 2007**

1.0 Introduction

- 1.1 The paper dated 15 August 2007 seeking authority to negotiate a draft settlement with SDS was endorsed such that negotiations should be progressed and any conclusions brought back to the Board for ratification.
- 1.2 Subsequently negotiations were progressed on a without prejudice basis resulting in a draft settlement proposal being put to SDS. In summary the resultant settlement of £2.5m in respect of:-
- Their prolongation and disruption claim,
 - certain historical unresolved changes and
 - unbudgeted changes required to out of value engineering
- represents a saving of £650,000 on the budget. In addition payment of £2m of the claim is deferred until delivery of the final items for each of the three critical design workstages – MUDFA designs, Design Completion Notifications and Design Assurance packages. The first payment of £0.5m is not due until the end of October, by which time any further issues with performance will have come to light.
- 1.3 It should be noted that SDS's performance in respect of the main scheme has improved over the last three and the deteriorating performance on the MUDFA design delivery has stabilised, but more improvement is required. Clearly the Project will need to closely manage SDS to maintain and further improve progress and there is nothing to suggest that this cannot be achieved. Settlement of the claim will assist in this by avoiding diverting SDS's attention from the main job in hand.
- 1.4 Concurrently options to address any ongoing underperformance were also to be considered.

2.0 Background

- 2.1 SDS submitted a claim totalling £2.8m, in addition there remained £1.1m of historical changes which remained unresolved, a total of £3.9m.
- 2.2 Our view in respect of the claim and twenty historical changes is:-
- There is a justifiable claim £1.2m to £1.8m for a 3 month delay due failures to deal with Preliminary Design expeditiously (2 months) and in respect of Critical Issues resolution (1month) delays.
 - Historical changes - £0.5m to £0.97m
- A total of £1.75m to £2.77m.

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- 2.2 **tie** have identified a potential counterclaim in respect of the impact of delays by SDS prior to the commencement of Detailed Design. As noted in previous papers the potential value of the counterclaim is up to £15m. This consists of
- Costs incurred project overhead costs incurred at the time of the delay
 - Costs in delaying the MUDFA programme due to SDS failures and
 - Future costs – the impact of delay caused by SDS on Infraco and Tramco price levels

Items 1 and 2 are historic costs incurred of approximately £5m. The balance, future costs are a little more speculative.

However, to date only an outline claim has been developed for the purposes of reducing the value of their claim and expectations in respect of disputed historical changes.

- 2.3 The options for either party to resolve the claim and counter claim are:-
- Follow the stepped contract dispute resolution process of resolution of the claim and **tie** counterclaim between principals, adjudication and finally if unresolved by the former, litigation.
 - A negotiated settlement

- 2.4 The reasons for pursuing a negotiated settlement rather than engaging in a contractual dispute escalation are:-
- To minimise the risks to the Infraco procurement. Novation of SDS to Infraco is a key element of the procurement strategy. Whilst SDS must, under their contract, accept novation Infraco is able to reject or qualify novation. Ongoing or escalating dispute with SDS will become evident to the Infraco in the due diligence process and is likely to provide Infraco with a reason for materially qualifying the novation. The likely qualification would at best be that the unresolved dispute remains with **tie** to settle or dispute. Whilst we are seeking to finalise a deal with Infraco such a situation would not help maintain the Infraco risk transfer objectives.
 - Minimise the impact on the design workstream – currently the most critical workstream for the Project
 - To avoid the cost of pursuing a formal claim and drain on **tie**'s commercial and engineering managerial time at this critical time in the programme.
 - We have no certainty of winning and would be difficult to sustain in formal proceedings. Whilst the delays to the design process on which the counterclaim threat is based can be evidenced as fact the causes of the delays (excluding MUDFA deficiencies) are largely based on anecdotal evidence and interpolation from events at the time. This is particularly the case for the events pre August 2006. The contracts do not appear to have been managed effectively by either party prior to this date. A significant proportion of the additional cost, circa £10m, relates to additional Infraco and Tramco inflation costs due to delay. This is a future potential loss and speculative rather than not an accrued loss at this point in time. Demonstrating this to any required evidential level could prove difficult, particularly in the light of market price changes. In addition the contract terms arguably time out any counterclaim, given the length of time that has elapsed since these certainly prejudicial events arose. However, to win the commission PB sold themselves as an organisation with world class capabilities in light rail design. Whilst perhaps not a contractually enforceable position their delivery of world class management would have avoided many of the difficulties created and encountered by them. This point is reinforced by the progress made under Steve Reynold's direction

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since January in bringing issues to a head and participating in their resolution.

- To recognise and settle quickly around the valid elements of the SDS claim whilst using the levers of a counterclaim to reduce the settlement figure.

2.5 On balance and based on the reasons set out above the effort required to formally develop and pursue a detailed counterclaim was not considered worthwhile. Hence the negotiated settlement approach should be explored.

3.0 Negotiations

3.1 Negotiations were undertaken in on SDS's figure of £3.9m. Both parties were not able to agree an acceptable figure based on the scope (claim plus twenty historic variations) of the negotiations outlined above. In order to find a basis for an acceptable compromise three further items were introduced into the negotiations:-

- The redesign of the Depot to take account of VE opportunities (SDS value £180k)
- Redesign of the alignment to take account of the omission of the EARL bridge at Ingliston (SDS value £125k)
- Provision of full technical support for MUDFA (SDS value estimated at £200k)
- **tie's** view of the price for these items is £330k (best case)

3.2 Taking these items into account the Parties view of the positions is:-

- **tie** – £2.2m, best case and £3.5m worst case.
- SDS - £4.5m (Representing their likely realistic expectation of between £3.4m and £2.5m as gleaned from their approach to negotiations)

Further details of the parties positions are shown in Appendix A.

3.3 A series of negotiation meetings were held on a without prejudice basis resulting in a draft settlement at £2.5m, including the three further items. This is at the lower end of **tie's** best/worst case settlement range.

4.0 The Draft Settlement Proposal

4.1 Details of the draft settlement are £2.5m for settlement of SDS's claim and any issues arising from their heads of claim up to 17th August 2007, settlement of the historical changes and settlement of the three additional issues introduced.

4.2 To incentivise SDS to deliver the key design outputs for Phase 1a payment is staged as follows:-

- £500k in the October 07 Valuation.
- £500K on satisfactory completion of the last utilities design for Phase 1a – estimated – December 07
- £500k on satisfactory delivery of the last design completion notification for Phase 1a – July 08
- £1,000K on satisfactory delivery of the last design assurance package for Phase 1a – September 08

4.3 This proposal has been confirmed to SDS but is subject to SDS (PB) Board approval and agreement of the formal legal settlement. Successful conclusion of this settlement is to be ratified by the Tram Project Board Procurement Sub Committee in late September 07.

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- 4.4 It should be noted that this draft settlement is specific to the SDS claim and the historic changes referred to in 1.2 above. It is not a once and for all settlement that closes off claims by **tie** for all other issues and any potential future performance failures.
- 4.5 Accordingly the settlement does not include:-
- Any settlement of the issues forming **tie**'s counterclaim. **tie** can return to this in the future in the negotiation of a defence of any future claims by SDS. A letter has been sent rejecting SDS's rebuttal of the heads of counterclaim set out in a without prejudice letter issued by them during the course of negotiations.
 - Any settlement of **tie**'s claims in respect of failures to deliver adequate and timely designs for the MUDFA programme. It is proposed that these are dealt with as part of the SDS final account. To establish the entitlement the relevant contractual notices will be issued.
 - Any compromise of **tie**'s position in respect of any potential future failure to deliver.
- 4.6 On conclusion of this settlement the tie chairman should write to the PB setting out **tie**'s frustration and concern that the management they have deployed and their approach generally has not lived up to the world class brand that they sold to **tie** and the residual worry that this will re occur, despite recent improvement. This should be followed up with a visit to the head of PB world in the US to reinforce this point. This lays down an informal marker should the position deteriorate again in the future.

5.0 Benefits of Proposed Settlement

- 5.1 The benefits of the draft settlement are:
- Minimises the opportunity for Infracore to pass SDS performance risk back to **tie**.
 - Recognises and recompenses SDS for the valid elements of their claim.
 - Settles price for outstanding SDS historical charges once and for all.
 - Includes payment in respect of the unbudgeted (but valid changes) in respect of the implementation of the Value Engineering changes at the Depot and the EARL bridge (**tie** value of these changes £230K).
 - Settlement represents a £2.0m reduction in SDS's expectation of £4.5m and a £0.65m saving against the current budget as shown below:-

	SDS Expectation (£m)	Settlement (£m)	Difference (£m)
Historical Changes	1.13	0.55	0.58
3 Additional items (VE and MUDFA support)	0.51	0.33	0.18
Claim	2.86	1.62	1.24
Totals	4.50	2.50	2.00
Budget	-	3.15	-
Saving on Budget	-	0.65	-

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- Provides incentivisation for SDS to deliver to the current programme by deferring payment of substantial sums to the completion of key designs stages. This:
 - Incentivisation aligns with the procurement and construction programme.
 - Keeps open the set-off of any **tie** claims for damage from any potential future failure in performance against the settlement sums.
- Avoids disruption and distraction to the project at this critical time.

6.0 Mitigation of future failure by SDS

6.1 SDS's performance in respect of both MUDFA designs and the main Project designs have improved over the last three months. Slippage has stabilised as is demonstrated in the Tram Project Board Progress Report.

6.2 Whilst SDS claim that their difficulties in delivering the design to programme are now over with the resolution of Critical Issues, there remains the possibility of future failure. Any such significant future failure would result in delay to the procurement programme and subsequent construction programme together with significant additional cost.

6.3 To mitigate against potential future failure the following are proposed:-

- Intensive monitoring of SDS's delivery programme on a weekly basis to identify any slippages. This will provide the earliest opportunity to resolve the issues causing any such delay. Any issues in respect of performance will be addressed by director level oversight committee with representatives from **tie** and SDS.
- Where delay is identified we promptly issue the appropriate formal notices in accordance with the contract (this may include persistent breach notices)
- Moratorium on changes to the design along the alignment, unless part of the Value Engineering programme.
- No further optioneering of the design along the alignment.
- Put the design of structures that are subject to realisation of Value Engineering opportunity on hold pending the development of alternative structures with Infracore bidders.
- Implementation of the planned due diligence by Infracore to identify any deficiencies in the SDS design at an early stage.
- SDS to provide a list of personnel committed to the completion of the Edinburgh Tram Project who will not be diverted except with the express written permission of **tie**.
- If future failure in performance arises set off **tie**'s costs against the deferred payment entitlements under the settlement agreement set out above.

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7.0 Recommendation

- 7.1 It is recommended that the Board:-
- Authorise the draft settlement, subject to SDS confirmation from their board and the agreement of the formal legal settlement and
 - Endorse the proposed actions to mitigate future delays.
- 7.2 The final settlement will be presented to the Tram Project Board Sub Committee for confirmation before final agreement and implementation.

Prepared by: Geoff Gilbert, Project Commercial Director

Recommended by: Matthew Crosse, Project Director

Date: 5 September 2007

Approved Date:-
David Mackay on behalf of the Tram Project Board

APPENDIX A

SDS CLAIM - SETTLEMENT SUMMARY Date:- 5/09/07

Item	SDS Opening Position	Likely SDS target settlement range		tie view of likely outcome		Budget
		Upper	Lower	Best	Worst	
Historical changes in dispute						
Disputed as changes	593,929			295,544	500,000	619,138
Not demonstrated as changes	403,073			149,198	350,000	130,471
Valuation of change disputed	138,574			103,931	125,000	150,571
Sub total	1,135,576	975,000	550,000	548,672	975,000	
Claim	2,858,517	2,025,000	1,950,000	1,200,000	1,800,000	2,000,000
Sub Total	3,994,093	3,000,000	2,500,000	1,748,672	3,750,000	
Additional items included in deal						
Depot redesign	180,000			150,000	180,000	0
Redesign to take out EARL bridge	125,000			80,000	100,000	0
Provision of MUDFA site support	1. 200,000	378,750	0	100,000	200,000	250,000
Total	4,499,093	3,378,750	2,500,000	2,078,672	4,230,000	3,150,180
Settlement				£2,500,000		
Settlement compared with Budget					Saving	£650,180
Settlement compared with SDS position Upper Limit expectation		Saving	£878,750			
Settlement compared with tie worst case				Saving	£1,730,000	
Settlement compared with tie best case				Extra	-£421,328	

Notes:-

1. No estimate received from SDS - tie estimate of SDS expectation



Transport Edinburgh
Trams for Edinburgh
Lothian Buses

Tram Project Board
Report on Period 6
Papers for meeting 26th September 2007

09:00am – 12:00pm

Distribution:-

David Mackay (Chair)
Willie Gallagher
Neil Renilson
Bill Campbell
Andrew Holmes
Matthew Crosse
Susan Clark

Donald McGougan
Graeme Bissett
James Papps
Alastair Richards
Jim McEwan
Jim Harries
Geoff Gilbert
Miriam Thorne (minutes)

Edinburgh Tram Network Minutes

Tram Project Board

05 September 2007

tie offices – Citypoint II, Brunel Suite

Principals		Participants:	
David Mackay	DJM (chair)	Matthew Crosse	MC
Willie Gallagher	WG	Graeme Bissett	GB
Donald McGougan	DMcG	Steven Bell	SB
		Bill Campbell	WWC
		Duncan Fraser	DF
		Susan Clark	SC
		Geoff Gilbert	GG
		Alastair Richards	AR
		James Papps (for James Stewart)	JP
		Miriam Thorne (minutes)	MT

Apologies: Neil Renilson, Andrew Holmes, James Stewart, Jim Harries, Jim McEwan

1.0	REVIEW OF PREVIOUS MEETING	
1.1	The previous minutes were taken as read.	
2.0	Matters arising	
2.1	DJM requested that, as previously agreed, CEC should provide a periodic report on progress to realise the £45m CEC contribution.	
2.2	WG explained that a letter of comfort to the Infracore bidders was no longer required at this stage.	
3.0	Progress presentations	
3.1	WG provided a brief overview of the presentations to the Board and the progress made since the last TPB – this would cover the critical workstreams of the project and the PD’s progress report should be taken as read.	
3.2	<u>Funding and approvals</u>	
3.2.1	GB provided an update on progress based on the previous TPB presentation. Key items discussed were: <ul style="list-style-type: none"> - Period progress meetings between CEC / TS; - Governances structures; - Approval processes; - FBC; and - Funding requirements. 	
3.2.2	<u>Period progress meetings</u> DMcG stated that the date for the 1 st meeting was now set. However, no feedback had been received from TS as to details of the agenda or level of attendance. CEC and the TPB remained committed to keep the	

	discussion at a high level with support provided by tie and TEL as necessary.	
3.2.3	WG stressed the importance of providing TS with sufficient information to enable the approvals timescales and permit achievement of cabinet endorsement of the FBC v1 and preferred bidder selection in October.	
3.2.4	<u>Governance:</u> GB stated that details of the operating agreements for tie and TEL were required for the FBCv1. The Board was informed that the agreement for TEL was nearing completion and would be shared with the Board as soon as possible.	DF
3.2.5	DMcG stated that the new CEC internal tram subcommittee was not designed to be another layer of decision making, but he would confirm the remit by the next TPB.	DMcG
3.2.6	GB provided a summary of the current tram internal governance structure. It was confirmed that the governing committees were formal board sub-committees. The Board noted there was no CEC representation on the Procurement Sub-committee and requested that DMcG should attend.	DMcG
3.2.7	The Board agreed that the Legal Affairs Committee was the correct forum to review risk allocation as per the contracts and confirm the adequacy of the risk allowances.	
3.2.8	GB also confirmed the role of the bid evaluation panel as the selection forum for the Infraco and Tramco bids, whose decision could be approved or rejected, but not overturned.	
3.2.9	<u>Approvals:</u> GB stated that, as part of the agreed approvals process, the OGC3 Gateway review had now been scheduled and would be undertaken by the same team that had been previously engaged. It was confirmed that cabinet approval for future funding would be required but no feedback had been received from TS as to details of their approval requirements. However, WG highlighted his high level discussions and the expected changes in management style.	
3.2.10	<u>FBC:</u> GB confirmed the principles for the FBCv1 were: <ul style="list-style-type: none"> - Business case for Phase 1a as standalone with information on 1b; - Funding considerations focus only on committed funding of £500m from TS and £45m from CEC; - An outline update was performed for the “no-EARL” scenario; - The DFBC would be changed as little as possible; and - Previous tax and corporate structuring assumptions were still valid. 	
3.2.11	DMcG stressed that, in light of a new administration, the FBC still needed to “sell” the project, i.e. why trams. He emphasised that this message should not be understated and requested tie support to briefings of the elected members. WG confirmed his commitment to personal involvement in this work to present what trams will mean to Edinburgh.	
3.2.12	<u>Funding – Grant Letter:</u> GB stated that a draft of the grant letter, developed in collaboration by tie / TEL / CEC had been sent to TS, as previous drafts had excluded a number of significant issues. A meeting would be held with TS prior to the next TPB to agree these matters.	

3.2.13	<u>Funding - Pre-close requirements:</u> GB provided a presentation on the potential funding requirements prior to financial close. The reason for this was that the original grant of £60m had been based on financial close in October 07. The delays during the summer due to the project review had caused some slower spend. However, to maintain the current programme, further expenditure commitments were required prior to financial close.	
3.2.14	GB stressed that there were good reasons for early mobilisation of the chosen preferred bidder to maintain the overall construction programme. Precise details of the amounts required were not known at this stage of the negotiations, but an order of magnitude of £5m-10m was indicated.	
3.2.15	The project had prepared proposals on how to manage the funding constraints to financial close and these will be closely monitored by the Board. It was stressed that if financial close was delayed, additional funding would be essential.	
3.2.16	It was highlighted that the current commitment profile included considerable sums for risk, primarily for MUDFA related risks. As time progresses, the crystallisation of these prior to financial close would become less likely, but the full risk content had to be included currently.	
3.2.17	DJM questioned what the implications on budget would be if financial close was delayed and borrowing would be required to cover the funding gap as well as what the legal implications would be in case of termination.	
3.2.18	The Board agreed that consideration should be given to promote different drawdown points on the grant if financial close was delayed for good reasons and a funding gap arose. As the Infraco deal would be known by 25 Oct, it should be possible for TS / CEC to come to an informal arrangement on how to cover any cash-shortfalls arising from normal operating matters.	
3.2.19	GB to prepare details of how and by whom the process would be managed.	GB
3.3	<u>Procurement</u>	
3.3.1	MC outlined the progress made on procurement for Infraco and Tramco. This included sharing of detailed information with Infraco, receipt of their BAFO, conclusion of negotiations with Tramco and start of preparing the deal packages which would cover all commitments made during the negotiations. He also confirmed that the current timescales still appeared broadly achievable.	
3.3.2	MC presented a short summary on the selected preferred Tramco bidder and requested approval from the TPB of the selection.	
3.3.3	DJM questioned why there was such an apparently large price difference between the two Tramco bidders. MC explained the key reasons were CAF's desire to break into the low-floor market and establish a flagship project in a mature western market. Their other major projects were in Bilbao, Seville and Malaga. He stated their technical aspects were superior to the other bidders and they provided better deals on supply and maintenance as well as on warranties.	
3.3.4	AR confirmed that both NJR and Transdev were fully supportive of the recommendation. Additionally, MC explained, the Infraco bidders were fully informed of the selection and had expressed no reservations.	

3.3.5	DJM questioned the ratio of passengers standing vs seated. AR provide the following details: CAF 80 seated 178 standing Resulting in 258 passengers per tram. This results in 160% capacity uplift to modern double decker buses with only a small reduction in the seating / standing ratio. WG also highlighted that there was an increased acceptance of standing on shorter journeys as experienced e.g. along Leith Walk. Additionally, the distribution of luggage space was enhanced plus added security provided by the fact that at times of low usage, half of the tram could be closed off.	
3.3.6	The Board agreed that the selection should be kept confidential for the moment, but that it would be advantageous to announce it prior to the next Council meeting. It was concluded that the TEL Board would be informed following this TPB meeting and formal announcements including press briefings would be undertaken in two weeks time.	
3.3.7	The TPB formally approved the recommendation of the Procurement Sub-committee to select CAF as the preferred Tramco bidder.	
3.4	<u>Value engineering</u>	
3.4.1	SB provided an update on the status of the VE exercise. He confirmed significant progress had been made in teasing out defined actions, particularly in relation to structures. He also confirmed that scope was being zealously protected.	
3.4.2	DMcG raised concerns about the impact of VE on the Infraco contracts. He requested assurance that items would not be removed to achieve VE targets which would have to be re-introduced at greater costs at a later stage. SB stated this risk was being managed through the close involvement of CEC in all decisions and that there was an acceptance that some items may have to remain open post-preferred bidder selection. DF also confirmed that CEC had also developed enhanced procedures to deal with prior approval issues.	
3.5	<u>MUDFA</u>	
3.5.1	SB gave a brief update on progress with MUDFA. Particularly, he highlighted that IFC's remained an issue and that he had issued instructions to ensure a four week window for IFC delivery was maintained to manage any safety risks. WG confirmed the matter was discussed in detail at the MUDFA sub-committee and a strong message had been sent to SDS.	
3.6	DF questioned whether there were any matters arising in regards to communication issues to the public – SB to follow up.	SB
3.6.1	DJM questioned whether the matter of the piling wall at the A8 had been resolved. SB explained that final design was outstanding, although there was a growing likelihood this work would not be required.	
3.6.2	Overall, the Board was informed that the incentivisation arrangements now in place provided significant opportunities for VE in cost and programme terms. There was no indication that the utilities were seeking to include any betterment in the works and no further risk to programme or costs have been identified.	
3.7	<u>SDS – progress</u>	

3.7.1	MC confirmed that all potential critical issues were being considered on a line by line basis and no further negative feedback had been received. He explained that the design review process had now started – this would focus on critical areas and had a sample size of 10%, which is significantly higher than industry averages.	
3.8	<u>SDS – claim</u>	
3.8.1	GG outlined the key features of the proposed commercial settlement of the SDS claim. These include payments of parts of the claim on achievement of pre-defined milestones. This also addresses future performance issues.	
3.8.2	JP questioned whether tie had prepared a counterclaim which remained on the table. It was explained that no formal counterclaim had been prepared. Legal advice had confirmed that it would be difficult to achieve a quick settlement through these channels, thus a commercial settlement was proposed. However, sufficient notice had been given to SDS in the past to build up a formal counterclaim if it was required in the future.	
3.8.3	DF queried whether settling the claim would remove frustration – GG confirmed that under the terms of the settlement, SDS could not walk off the job. Additionally the strong message was send to SDS that achievements of the current programme are essential to keep the project going.	
3.8.4	AR questioned how settlement of the claim and the requirements which tie has on SDS delivery to support, e.g. the TRO process, would be dealt with under novation. GG explained that the contract could be split accordingly. Any future performance issues would be dealt with separately, including penalties for lack of delivery to programme and dispute clauses for future slippage.	
3.8.5	DJM requested that a clearer link should be provided between commitments under the claim settlement and progress against programme, including details of the design due diligence programme.	SB
3.8.6	The Board was informed that the legal terms of the settlement would be drafted by Andrew Fitchie of DLA and the TPB confirmed that it approved the settlement based on the information presented.	
3.9	<u>Programme</u>	
3.9.1	SC provided a programme update. She requested that information was provided from CEC on their programme for engagement with stakeholders.	DF
4.0	Cycles on trams	
4.1	AR presented the paper on cycles on trams, which was based on research undertaken by tie , TEL, Transdev and CEC. It concludes that for safety reasons, cycles should not be carried on trams. However, TEL was committed to provide as much alternative integration with cycles, e.g. provision of cycle storage at tram stops where possible.	
4.2	DMcG confirmed discussions were ongoing with SPOKE, the cycling lobby group, on initiatives such as cycle loan facilities and that a wider information package on the issue should be prepared.	AR / DF / MCon

5.0	IPR 2	
5.1	SC gave a verbal update on the current status and asked the Board to note that the current change notice for the provision of funds for temporary facilities would be cancelled but funding would be required for the permanent measures. An appropriate change request would be raised.	SC
6.0	AOB	
6.1	WG questioned how CEC will deal with information and briefing requests from stakeholders. He cited the request for information received by tie from Sir Terry Farrell as an example. DF stated this request had arisen from a CEC internal information gap and steps were being made to close any such information gaps. He committed to provide details of the programme for the required briefings.	DF
6.2	DJM questioned the status of agreement on Picardy Place. DF stated that final SDS design had not been received and that meetings were ongoing to resolve the outstanding issues. He expected resolution by the 7 Sept. and would provide feedback to the TPB.	DF / AH
6.3	DJM questioned comments received that additional £5m funding from CEC may be available over and above the £45m contribution to cover such design changes. MC stressed that any features outside the DFBC scope would constitute a change and required additional funding.	

Prepared by Miriam Thorne, 24 Sep. 07



Transport Edinburgh
Trams for Edinburgh
Lothian Buses

Tram Project Board
Report on Period 7
Papers for meeting 31st October 2007

09:00am – 12:00pm

Distribution:

David Mackay (Chair)
Willie Gallagher
Neil Renilson
Bill Campbell
Andrew Holmes
Matthew Crosse
Susan Clark
Steven Bell

Donald McGougan
Graeme Bissett
James Stewart
Jim Harries
Jim McEwan

ETN Minutes Tram Project Board 26 September 2007

tie offices – Citypoint II, Brunel Suite

Principals		Participants:	
David Mackay	DJM (chair)	Matthew Crosse	MC
Willie Gallagher	WG	Graeme Bissett	GB
Donald McGougan	DMcG	Steven Bell	SB
Andrew Holmes	AH	Bill Campbell	WWC
Neil Renilson	NR	Duncan Fraser	DF
		Susan Clark	SC
		Geoff Gilbert	GG
		Alastair Richards	AR
		James Papps (for James Stewart)	JP
		Colin McLauchlan	CMcL
		Jim McEwan	JMcE
		Miriam Thorne (minutes)	MT

Apologies: James Stewart

1.0	REVIEW OF PREVIOUS MEETING	Action
1.1	The previous minutes were taken as read.	
2.0	Matters Arising	
2.1	WG confirmed that he would provide an update on current plans for tram design to Sir Terry Farrell if required – feedback requested before 12/10/07.	
2.2	AH requested support from tie for the 4-weekly meetings between CEC and TS – attendance was to be agreed between CEC and tie off-line	AH
3.0	Presentations	
3.1	WG provided a high-level overview of key elements progressed during the period and the issues to be discussed in detail at this TPB.	
3.2	OGC Review	
3.3	SC provided an update on the programme and scope for the review which was to commence on 1 st October. She highlighted that the OGC team had indicated particular interest in the arrangements for governance during construction, the funding arrangements and technical integration plans. It was confirmed that CEC are the client for this OGC review.	
3.4	DJM gave feedback on his interview with the OGC team. Key questions discussed related to contingencies management and risk transfer, contracts management during construction and how novation will work in practice. Further, plans relating to operational phases were requested.	
3.5	Additionally, DJM confirmed that the OGC team had expressed interest in the matter of concessionary fares and their significance to the project. The TPB were informed that there were a number of issues to consider on this matter: <ul style="list-style-type: none"> - 23% of current LB revenue relates to concessionary fares – if tram was not treated equally to bus, a considerable element of tram 	

	<p>revenue may be lost</p> <ul style="list-style-type: none"> - TS are not currently willing to provide assurance on concessionary fares. However, indications have been that this reluctance was regarding the level of concessionary fares in the future, not about the principle of concessionary fares for tram on the same basis as for bus 	
3.6	The TBP agreed that this matter was an operational issue for TEL and should be discussed by the TEL board.	
3.7	Governance, funding and programme to Financial Close	
3.8	GB stated that the 1 st meeting of the 4-weekly reviews between TS and CEC had been held previously.	
3.9	<p><u>Governance:</u> The TPB discussed the governance structure proposed for construction and agreed the following:</p> <ul style="list-style-type: none"> - The TPB will be a formal sub-committee of the TEL board. The arrangement will ensure that the TPB retains its power as key decision making forum. - The TPB sub-committees would evolve as proposed in the governance paper and agendas, remits and lists of attendees would be defined during the coming months. - The TEL board would remain as is with a review of timing and agenda following financial close - The tie board would continue as is, including relevant committees (audit / remuneration / safety (to be set up) / etc). The meeting cycle and agenda are to be reviewed. <p>GB was to update the paper for the next TPB</p>	GB - done
3.10	The TPB agreed that although the governance structure describes a number of meetings as sub-committees, these are more akin to management team meetings to harness relevant experience and allow integration of all stakeholders with the aim to provide recommendations to the TPB.	
3.11	Another key item to clarify is the role and scope of the CEC tram sub-committee so that it could be included in the proposed governance schematics. AH to feed back.	AH
3.12	The TPB also confirmed that there was no alteration to the arrangements for change control.	
3.13	<p><u>Expenditure and funding:</u> The TPB noted that current indications were that there was sufficient funding in place to cover requirements until the projected Financial Close date of January 08. This was dependent on a number of management actions and assumed no delay to Financial Close. Progress would be monitored and reported via the 4-weekly report</p>	GB – done

3.14	MUDFA	
3.15	SB gave an update on the current situation regarding progress, contract management and expenditure. He highlighted that the current cost position was as expected. However, it was too early to assess how much of the MUDFA risk contingency would be utilised this year. He also confirmed that the commercial issues with the SUCs were being resolved.	
3.16	The key issue for MUDFA is the delivery of the IFC drawings to programme. The design contract was being closely managed by tie but it was important not to dilute SDS's responsibility to obtain approvals from the SUCs. SB confirmed that settlement payments on the claim were contingent on delivery of utility drawings. SB to update TPB on progress.	SB
3.17	Another key item related to BT design and cabling programme – tie is working with BT to explore ways of reducing the impact.	
3.18	AH questioned when the more difficult sections for utility diversions would be tackled – SB confirmed that initial work would commence in October 07 with physical works starting in April 08. WG stressed the success of trial holes in mitigating issues. However, all progress was also dependent on support from CEC and TEL.	
3.19	Design	
3.20	MC highlighted that current progress showed a good correlation to the approved V17 programme. He pointed out that the current shortfall related to 26 packages and SDS had produced approximately 58%-60% of the detailed design. He also stated that the design review process had now commenced which would address quality issues with CEC's input.	
3.21	SB explained that the design delivery for MUDFA had been stripped out of the overall design programme to allow sufficient detailed monitoring.	
3.22	AH raised concerns that the programme assumed that SDS would get designs right first time and what the impact on the CEC review would be. MC pointed out that the programme review accepted the technical and prior approval timescale and had been developed with input from CEC. DF was to perform a detailed review of the programme and feedback to AH and the TPB.	DF
3.23	MC explained that the proposed commercial settlement of the claim had been accepted by the PB UK board and was now being finalised, subject to some legal drafting.	
3.24	Procurement	
3.25	MC / GG presented the progress made on the Infracore bid negotiations and evaluation. GG confirmed that, as the bids were very close at this time in their results on normalised basis, this gave greater credence to the option to go back to the reserved bidder, should the necessity arise.	
3.26	GG explained that the current prices were based on a programme which included procuring materials of up to £60m immediately post Financial Close. The benefit, other than for the programme, was that this would de-risk the bidders procurement chain. Similar early payments were considered for Tramco.	
3.27	GG stated that both bidders had provided detailed programme proposals. However, their achievements would be contingent on assumed productivity rates for on-street works and early mobilisation.	

3.28	The TPB was informed that the offer of a £5m discount for Phase 1b only applied to concurrent construction.	
3.29	Value engineering	
3.30	JMcE presented an update on VE. He expressed concerns about some of the anticipated savings on structures due to the lack of detailed design available. However, he stated that much of the VE works resulted in reducing potential future costs, thus reducing risks for the project.	
3.31	The TPB recognised that the proposed capital costs for the project of £498m included significant VE savings. Concerns were raised that the capital £'amount could therefore move upwards between October and December when final Council approval was sought. However, it was recognised that using a range or a higher number would introduce ambiguity and may reduce the bidders' commitment to meet budget. These considerations were set against concerns about the impact on public perception should the number change. Ultimately, the TPB agreed that there were sufficient levers available to the project to ensure that changes in VE could be absorbed within the estimate.	
3.32	FBC	
3.33	MT provided an update on the current status of the FBCv1 which was targeted for completion by 03 October.	
3.34	The TPB agreed that there would be no update to the TEL business plan for the FBCv2 in December.	
3.35	Legals and contracts	
3.36	SC provided an update on progress which included close working with CEC legal and focussed on risk transfer as per the Infraco contracts. She confirmed that a separate risk review was being procured by CEC.	
3.37	GB highlighted that briefing of TS / the minister on the FBCv1 and the recommendation of the Preferred Bidder should take place immediately following the approval by the Council on October 25 th .	
3.38	Stakeholder and communication management	
3.39	CMcL outlined the proposed briefing programme. It was confirmed that a similar process for briefings should be followed in December in the lead up to Financial Close.	
4.0	IPR	
4.1	SC provided an update – no issues were raised.	
5.0	Funding of works outside the core scheme	
5.1	SC presented the paper which set out the principles for funding of items not included in the project scope. The TPB confirmed that this presented no change to the current arrangements on change control and accepted the recommendations of the paper.	
6.0	Public Realm	
6.1	The TPB noted the paper but stated this was a matter for the TEL board and / or the CEC tram sub-committee.	
7.0	CEC contribution	
7.1	AH provided an update on the progress to secure CEC's contribution to the project. A concern was raised as to how borrowing costs would be met. DMcG stated that CEC recognised this was not part of the tram cost estimate.	

FOISA exempt
 Yes
 No

8.0	AOB - CEC / TEL recharges to the project	
8.1	DJM stated that the TEL recharges to the project for staff time would cease as of September 07 and that an agreement had been achieved with Tom Aitchison that CEC recharges would discontinue from 31 March 08. DMcG to confirm at next TPB.	DMcG

Prepared by Miriam Thorne, 25th September 2007

Edinburgh Tram – Additional Design Costs

Tram Sub-Committee

12 May 2008

1 Purpose of report

- 1.1 To notify the Tram Sub-Committee, as required by Council, of additional design costs relating to approved changes and prolongation claims submitted to **tie ltd** by Parsons Brinkerhoff (PB) under the System Design Services Contract (SDS) for work undertaken on the Edinburgh Tram Network (ETN).

2 Summary

- 2.1 The contract for SDS was awarded to PB on 19 September 2005 for the design of the ETN infrastructure.
- 2.2 Two requests for additional costs have been submitted to **tie Ltd** from SDS. A report went to the Tram Project Board on 9th August 2007 providing details of the initial SDS which was settled by **tie Ltd** in September 2007.
- 2.3 A second request was then tabled by SDS in January of 2008.

3 Main report

Recent Developments

- 3.1 The remit of the Tram Sub-Committee was approved by Council on 20 September 2007, with the proviso that the Sub-Committee was empowered to take the final decision with respect to the settlement of any financial claims that might arise against tie/the Council, subject to ratification by the full Council for amounts in excess of £500,000.
- 3.2 SDS submitted a request for £2.8m representing their purported additional management costs resulting from changes, delayed critical issues resolution and delays to approval of preliminary design. Approximately £1.5m of this request represented a claim for prolongation of works.
- 3.3 **tie Ltd** subsequently settled with SDS for £2.5m, following approval from the Tram Project Board in August 2007. As the project is dependant on design progress, achievement of approvals and novation of SDS to the Infraco Contract, any protracted dispute would have had an adverse effect on the progress. Any dispute resolution process may also have resulted in SDS referring the matter to adjudication but this may have also harmed contractual negotiations.
- 3.4 The commercial settlement was based on:
 - Design Deliverables
 - Delivery of the utilities design to the agreed programme
- 3.5 SDS tabled a further request for Additional Management and Supervision Services on 14 January 2008 in the sum of £599k, of which £200k related to prolongation claims. In this request SDS detailed their entitlement to reimbursement of additional costs due to delays as a result of the resolution of a number of critical issues, some involving third party agreements, delays in the provision of information by Statutory Authorities on the Utilities work and delays due to providing additional support for preferred bidder negotiations. The claim assessed the impact on time and cost of prolongation of additional management and supervision services as booked from end November 2007 to 5 January 2008 and estimated further costs from 5 January 2008 to revised completion date. **tie Ltd** disagreed with many aspects of the claim however it was acknowledged that prolongation had occurred and that SDS would be entitled to some recompense.
- 3.6 Following a series of meetings between management of **tie Ltd** and SDS the settlement was agreed at £450k.
- 3.7 Both settlements are included within the estimated final cost of £508m as reported to Council on 1 May 2008.

4 Financial Implications

- 4.1 The effect of contract variations and prolongation claims by SDS has resulted in additional costs of £2.95m that will be managed by **tie Ltd** within the overall project costs.

5 Conclusions

5.1 To note that the additional payments will be made to SDS.

6 Recommendations

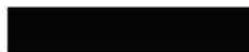
6.1 To note the two payments totalling £2.95m to SDS for additional work on the ETN.

Donald McGougan
Director of Finance

Appendices None

Contact/tel

Alan Coyle



Wards affected

All

**Background
Papers**

None

Andy Conway

From: John.Ramsay@transportscotland.gsi.gov.uk
Sent: 18 January 2008 13:21
To: Rebecca Andrew
Subject: grant agreement schedule
Attachments: Grant Offer Draft Schedule -FINAL Clean Copy.DOC; PRACTICE-#7027707-v1I-Grant_Offer_FINAL Draft_Schedule.DOC

Rebecca

<<Grant Offer Draft Schedule -FINAL Clean Copy.DOC>> <<PRACTICE-#7027707-v1I-Grant_Offer_FINAL Draft_Schedule.DOC>>

Herewith both clean and track-changed copies of the Schedule. From the latter you will be able to satisfy yourself regarding any minor amends that I have made resulting from our line-by-line editing, together with the small paragraph covering National Transport Strategy as previously discussed.

Also and as advised, the annex 2 material is still a work in progress as we finalise amendments to the Pre-payment and 4 weekly promoter reporting papers; the attached are therefore for reference / illustration only

I don't think there are likely to be any remaining difficulties but happy to discuss if there are.

John Ramsay

Project manager - Edinburgh Trams

Rail Directorate

Transport Scotland

Buchanan House

Glasgow G4 0HF

Tel [REDACTED]

mobile [REDACTED]

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GRANT OFFER TO CITY OF EDINBURGH COUNCIL FOR CONSTRUCTION OF PHASE 1 OF THE EDINBURGH TRAM NETWORK

SCHEDULE 1

TERMS AND CONDITIONS

CONDITIONS OF GRANT

- 1 These are the Terms and Conditions reserved in the foregoing Letter of Offer of Grant to the Council.

Interpretation

- 2.1 In the foregoing letter, this Schedule and the Annex –

“**Annex 1**” means Annex 1 to this Schedule;

“**Annex 2**” means Annex 2 to this Schedule 1, consisting of 4 parts;

“**Applicable Law**” means regulation, Legislation, practice or concession or official directive, ruling, request, notice, guideline, statement of policy or practice by any relevant legislative authority, the European Union, governmental, local, international, national or other competent authority or agency (whether or not having the force of law in respect of which compliance by tramway owners and operators is generally customary);

“**Business Day**” means any week day during which the Scottish Clearing Banks (or majority of them) are open for business;

“**Council**” means **City of Edinburgh Council**;

“**Eligible Capital Costs**” shall be construed in accordance with Annex 1;

“**Event of Default**” means the occurrence of the events or circumstances specified in Clause 13.1;

“**Financial Year**” means the period from 1 April in a calendar year up to and including 31 March in the following calendar year;

“**Funded Assets**” means heritable and moveable assets employed for the purposes of the Project which have, at any time, been funded in whole or in part from the Grant and any replacements thereof.

“Grant” means the grant offered to the Council by the Scottish Ministers under Section 70 of the Transport (Scotland) Act 2001;

“Grant Agreement” or **“Agreement”** means the Letter, these Terms and Conditions and Annexes 1 and 2 and the Council’s acceptance;

“Instalment” means an instalment of the Grant ascertained in accordance with Annex 2;

“Letter” means the foregoing letter of offer of Grant;

“Major Trams Contracts” means the Development Partnering and Operating Franchise Agreement, the System Design Services Agreement, the Multi-Utilities Diversion Framework Agreement, the Infrastructure Provider and Maintenance Agreement and the Vehicle Supply and Maintenance Agreement and any other contract relating to the Project having a value of £1,000,000 (one million pounds) or more;

“Project” shall be construed in accordance with Clause 3;

“Reports” means the Reports specified in Annex 2;

2.2 In the Agreement, except where the context otherwise requires:-

- (a) words denoting the singular shall include the plural and vice versa and words denoting any gender shall include all genders;
- (b) the headings in this Agreement are for convenience only and shall not be taken into account in their interpretation;
- (c) save as otherwise provided herein, any reference to a Clause or Paragraph shall be a reference to a Clause of this Schedule or a Paragraph of the Letter;
- (d) any reference to any Act of Parliament or any Act of the Scottish Parliament or any enactment of the European Parliament, the European Council or the European Commission having the force of law shall be construed as a reference to the Act of Parliament or Act of the Scottish Parliament or the enactment as from time to time amended, extended or re-enacted and to include any bylaws, statutory instruments, rules, regulations, orders, notices, directions, directives, consents or permissions made or given thereunder. Similarly, any reference to that statutory instrument, regulation or order shall be construed as a reference to that statutory instrument, regulation or order as from time to time amended, extended or re-enacted;
- (e) all references to agreements or documents include a reference to that agreement or document as amended or supplemented from time to time or to any replacement or superseding agreement, document;

- (f) any undertaking by either of the parties not to do any act or thing shall, so far as it is within the power of the relevant party, be deemed to include an undertaking not to allow, permit or suffer the doing of that thing;
- (g) any reference to “procure” shall mean to bring about or cause to happen;
- (h) any notice, instruction, notification, direction, request, consent or approval contemplated herein shall be made or given in writing;
- (i) expressions defined in the Companies Act 1985 shall have the same meaning in this Agreement; and
- (j) anything which may be done by the Scottish Ministers may be done by any person duly authorised by the Scottish Ministers for that purpose.

Purpose

- 3.1 The Grant shall be used only for the purpose of meeting part of the Eligible Capital Costs of the Construction of the Project incurred until 31 March 2011 and for no other purpose whatsoever, but this provision shall not prevent the Council from making application for Instalments after 31 March 2011.
- 3.2 The Project means Phase 1a of the Edinburgh Tram Network or if Clause 3.3 applies Phases 1a and 1b of the Edinburgh Tram Network.
 - 3.2.1 Phase 1a of the Edinburgh Tram Network means the construction of a tramway system complying with all Applicable Law from Leith Waterfront (Newhaven) via Princes Street and Haymarket to Edinburgh Airport and is sometimes referred to as “Phase 1a”.
 - 3.2.2 Phase 1b of the Edinburgh Tram Network means the construction of a tramway system complying with all Applicable Law from Granton Square via Ferry Road to Haymarket and is sometimes referred to as “Phase 1b”.
- 3.3 The Council shall be entitled at any time between 1 January 2009 and 31 December 2009 to give notice in accordance with Clause 3.4 to the Scottish Ministers that it wishes to increase the scope of the Project to include Phase 1b and if the conditions set out in Clause 3.4 are, or have been, implemented to the satisfaction of the Scottish Ministers the Scottish Ministers shall so notify the Council and with effect from the date of such notification the expression “Project” shall be construed accordingly.
 - 3.4.1 The notice referred to in Clause 3.3 shall state the date upon which the construction of Phase 1b is to commence and shall be accompanied by evidence that
 - (a) Phase 1a is at the date of the notice to time and on budget

- (b) Phase 1a is forecast on reasonable and fully disclosed assumptions to be completed on time and to budget
- (c) the inclusion of Phase 1b in the Project has been allowed for in the forecast referred to in (b) above
- (d) all OGC Gateway Reviews due prior to the date of the notice have been completed and that all recommendations have been implemented and in so far as such recommendations relate to future activities, robust arrangements have been made to implement such recommendations.
- (e) the Council has adequate financial resources to meet the costs of Phase 1b and that the affordability assessment referred to in Paragraph 3.2.1(a) of the Letter remains valid.
- (f) the Council will be able to cancel or suspend Phase 1b at any time without adverse effect on the progress of Phase 1a.
- (g) there is no projection of a requirement for an ongoing subsidy for the Edinburgh Tram Network during the operational phase.
- (h) the Benefit Costs Ratio remains greater than 1.

3.4.2 The conditions referred to in Clause 3.3 are:-

- (a) that the Scottish Ministers are satisfied with the notice referred to in Clause 3.4.1 and the accompanying evidence
- (b) that the parties have agreed any amendments which may be necessary to paragraph 4.2 of the Letter
- (c) that no Event of Default has occurred and that no event which with the giving of notice, lapse of time or other conditions may constitute an Event of Default has occurred.

3.4.3 The Scottish Ministers shall be entitled in their sole discretion to waive or deem to be satisfied in whole or in part the conditions referred to in Clause 3.3.

3.5.1 The Council shall carry out the Project with all due diligence and will perform its obligations under the Major Trams Contracts as they fall due for performance and will not exercise any rights to terminate any of the same without first giving the Scottish Ministers 30 days notice.

3.5.2 The Council shall at all times during the carrying out of the Project and the subsequent operation of the Edinburgh Tram Network have due regard to the objectives of the Scottish Ministers as set out in the National Transport Strategy and the Government Economic Strategy.

- 3.6 The Grant shall be used solely to meet part of the Eligible Capital Costs in accordance with this Agreement and for no other purpose whatsoever.
- 3.7 For the avoidance of doubt it is specifically declared that the Grant is a subsidy only and not a payment for services provided or to be provided to the Scottish Ministers.

Payment

- 4.1 The Grant so far as not already paid shall be paid in Instalments and the first Instalment shall be paid following receipt of a valid claim in accordance with Annex 2 and accompanied by the Reports completed to the satisfaction of the Scottish Ministers.
- 4.2 The Council shall provide the Reports and application for Instalments in accordance with Clauses 4.2.1 and shall take part in the review meetings in accordance with Clause 16.2.
 - 4.2.1 Reports and applications for Instalments shall be made in accordance with the programme of Period End Dates and Application Dates notified to the Council by the Scottish Ministers before the commencement of each Financial Year.
- 4.3 Each application for an Instalment shall be accompanied by evidence of the extent to which the Council has funded from its own resources its share (8.3%) of the Eligible Capital Costs ("the CEC Contribution") and any other costs of the Project incurred to the date of claim and in the event that any of the Reports disclose that the Council has not provided such funding in whole or in part then such Report shall set out the Council's proposals and timetable for providing funding to the level required.
- 4.4 Within Five Business Days of the receipt of an application for an Instalment the Scottish Ministers shall advise the Council of the extent to which that application has been approved and at any time after receipt of the notification the Council may issue an invoice in respect of the approved amount. The Scottish Ministers will pay valid invoices within 28 days.
- 4.5 The Scottish Ministers will pay the Grant and all Instalments to the Council's Bank Account at Royal Bank of Scotland, St Andrew Square, Edinburgh, Sorting Code: 83 06 08, Account No: 11342348.
- 5 No part of the Grant shall be used to fund any activity carried out, or material published by the Council, which is party political in intention, use, or presentation or appears to be designed to affect support for a political party.
- 6 The Scottish Ministers may refuse to make any or all payments of Instalments if they are not satisfied that the Council will use the Grant for the purpose specified in Clause 3. The Scottish Ministers may refuse to make payment if

they are not satisfied that any previous Instalment paid to the Council has been used for the purpose determined in Clause 3.

- 7 The Scottish Ministers shall not be bound to pay to the Council
- (a) any sum by way of Grant which would cause the maximum stated in the Letter to be exceeded or in any Financial Year in excess of the amounts specified in Paragraph 4.2 of the Letter.
 - (b) any sum by way of Grant where, as at the due date for payment, an Event of Default (or event which with the giving of notice, lapse of time or other condition may constitute an Event of Default) has occurred. The Scottish Ministers may at their discretion pay the Grant or any part of an Instalment otherwise due to be paid or any part thereof notwithstanding, and without waiving, any such Event of Default or event.

Audit Certificate

- 8.1 The Council shall ensure that adequate internal expenditure controls are in place and that all resources are used economically, effectively and efficiently. The Council shall hold all funding related to the project comprising both Grant from the Scottish Ministers and its own cash funding in a separate bank account for the Project and shall not make payments to Transport Initiative, Edinburgh (“**tie**”) in advance of need. A copy of the relevant accounting record shall be provided to the Scottish Ministers with the Audit Certificate referred to in Clauses 8.2 and 8.3 below.
- 8.2 The Council shall supply and shall procure that **tie** shall supply to the Scottish Ministers such documents and information which they may reasonably require in connection with the Grant and the Project.
- 8.3 The Council shall within three months following the end of each Financial Year in which Instalments have been paid and of receiving the final Instalment of the Grant submit to the Scottish Ministers a statement of compliance with the terms and conditions of the Grant Agreement using the form of words below.

The statement shall be signed by the Council’s Director of Finance.

“STATEMENT OF COMPLIANCE

The Edinburgh Tram Network

This is to confirm the Grant claimed by City of Edinburgh Council in relation to the above project during the Financial Year ended [31 March 20xx] was properly due and was used for its intended purpose(s) in accordance with the terms and conditions of the Grant Agreement. This statement is supported by the records of City of Edinburgh Council.

Signed:

Name in block capitals:

Director of Finance”

- 9.1 The Council shall keep and maintain for a period of 3 years after the Project is completed, adequate and proper records and books of account recording all receipts and expenditure of monies paid to it by the Scottish Ministers by way of the Grant. The records and books of account shall also record all funding by the Council of the Eligible Capital Costs. The Council shall procure that **tie** shall keep and maintain for a period of 3 years after the Project is completed adequate and proper records and books of account recording all receipts and expenditure of monies relating to the Project.
- 9.2 The Council shall by 30 June next following the end of any Financial Year in which Grant has been paid submit to the Scottish Ministers an audit certificate.
- 9.3 The audit certificate shall be prepared by the Council’s Head of Internal Audit, or by the Council’s Director of Finance or by external auditors in a style approved by the Scottish Ministers. The audit certificate shall show Eligible Capital Costs and actual expenditure met from the Grant and the Council’s funding. Irregularities within the audit certificate shall be treated as a breach of this Agreement and shall be consequently subject to the provisions of Clause 13 of this Schedule.
- 9.4 The Council shall throughout the period of the payment of Instalments and thereafter until 3 years after the final payment by the Scottish Ministers to the Council pursuant to this Agreement present to the Scottish Ministers not later than six months after the end of every accounting reference period a copy of the audited financial statements of **tie** and the audited consolidated financial statements of any group of companies of which **tie** forms part for that accounting reference period.

Inspection of the Council’s Accounts and Records

- 10.1 If the Scottish Ministers consider it necessary to gain access to and inspect the Council’s accounts and records to verify the proper use of the Grant in accordance with Clause 3, the Council shall on 3 Business Days notice issued by the Scottish Ministers, make all accounts and records available to the Scottish Ministers, their representatives, the Auditor General for Scotland, his/her representative and such other persons as the Scottish Ministers may reasonably specify from time to time. The Council shall provide such reasonable assistance and explanation as the person carrying out the inspection may from time to time require. Should the Scottish Ministers exercise this right of inspection, the Scottish Ministers shall subject to Clause 12 keep the contents of the accounts and records confidential. However the duty of confidentiality shall not prejudice the Scottish Ministers from using the information in the management of the Grant nor from any action the Scottish Ministers wishes to take in accordance with Clause 13.

10.2 If the Scottish Ministers considers it necessary to gain access to and inspect the accounts and records held by **tie** to verify the proper use of the Grant in accordance with Clause 3, the Council shall procure that on 3 Business Days notice issued by the Scottish Ministers, **tie** makes all accounts and records available to the Scottish Ministers, their representatives, the Auditor General for Scotland, his/her representatives and such other persons as the Scottish Ministers may reasonably specify from time to time. The Council shall procure that **tie** shall provide such reasonable assistance and explanation as the person carrying out the inspection may from time to time require. Should the Scottish Ministers exercise this right of inspection, the Scottish Ministers shall subject to Clause 12 keep the contents of the accounts and records confidential. However the duty of confidentiality shall not prejudice the Scottish Ministers from using the information in the management of the Grant nor from any action the Scottish Ministers wishes to take in accordance with Clause 13.

Compliance with Law

11 The Council shall and shall procure **tie** shall comply with all Applicable Law including without limitation the Data Protection Act 1998 and will not and shall procure that **tie** will not commit any act of discrimination rendered unlawful by the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 (as such legislation may be amended or re-enacted from time to time) or any other legislation relating to discrimination on any ground whatsoever.

Publicity and Confidentiality

12.1.1 The Council shall and shall procure that **tie** and Transport Edinburgh Limited ("TEL") shall acknowledge in all publicity material (including any websites) relating to the Project, the contribution of the Scottish Ministers to the Eligible Capital Costs. The form of such acknowledgement shall be agreed between the Council and the Scottish Ministers prior to its first publication. For the avoidance of doubt "publicity material" does not include routine announcements of an operational nature, emergency announcements or statements or publicity material of an essentially ephemeral nature.

12.1.2 The Council shall and shall procure that **tie** and TEL shall give the Scottish Ministers early warning (meaning not less than 5 Business Days notice) of all major announcements regarding the Project and at least 48 hours notice of minor announcements. Notwithstanding Clause 15, notice of announcements pursuant to this Clause 12.1 may be given by email. This requirement does not apply to routine announcements of an operational nature or emergency announcement or statements.

12.2 The Council shall not, and shall ensure and procure that **tie** and TEL and its and their respective agents, employees, representatives and sub-contractors do not, communicate with representatives of the press, television, radio or

other communications media on any matter concerning this Agreement without the prior approval of the Scottish Ministers.

- 12.3 The Scottish Ministers may publish or disclose this Agreement or any part of it, any information concerning this Agreement or matters arising out of or in connection with it, the performance of the Council under this Agreement and any other information as it may deem appropriate from time to time. The Scottish Ministers shall use reasonable endeavours to notify the Council prior to publishing or disclosing any such information directly relating to the Council, and shall take into account any representations which the Council may make in connection therewith.
- 12.4 The Council shall and shall procure that **tie** and TEL shall do all things necessary to facilitate the Scottish Ministers' compliance with the Scottish Government's Publication Scheme (as required by section 23 of the Freedom of Information (Scotland) Act 2002) in force from time to time.
- 12.5 The Council shall and shall procure that **tie** and TEL shall and shall procure that **tie** and TEL shall use reasonable endeavours to procure that sub-contractors shall treat as confidential and shall not disclose to any third party except with the prior consent of the Scottish Ministers (which may be granted subject to such conditions as the Scottish Ministers may see fit) any information obtained by it from the Scottish Ministers under or in connection with the Agreement.
- 12.6 Notwithstanding any of the foregoing provisions of this Clause 12, or any other provision of this Agreement, either Party may disclose any information:
- 12.6.1 for judicial purposes;
- 12.6.2 which is or becomes public knowledge (other than by breach of this Clause 12)
- 12.6.3 which is in possession of the Party disclosing it without restriction as to its disclosure before receiving it from the disclosing Party; or
- 12.6.4 which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure.

13 DEFAULT, CURE AND REMEDIES

13.1 Default

The occurrence of any of the following circumstances or events shall constitute an Event of Default:

- (a) the Council knowingly and deliberately giving any fraudulent written information to the Scottish Ministers which read as a whole is incorrect or misleading, in substance or the manner of presentation, in

a material respect whether such information is provided prior to or after the payment of any Grant is made;

- (b) the Council ceasing or threatening to cease to deliver the Project or any material part thereof;

- (c) the Council committing a material breach of any provision of this Agreement which if capable of remedy has not been remedied within 7 days;

- (d) any authorisation, approval, consent, licence, exemption, filing, registration or notarisation or other requirement necessary to enable the Council to comply with any of its obligations hereunder which are material (as determined by the Scottish Ministers) being modified, revoked or withheld or ceasing to remain in full force and effect and not being reinstated in full force and effect or replaced by an equivalent (other than where such reinstatement or replacement requires to be sought by a party other than the Council not being a subsidiary Company of the Council), unless lack of the same does not affect the delivery of the Project or any of them and said reinstatement or replacement is achieved within 7 Business Days;

- (e) if, the Scottish Ministers having issued a Cure Notice pursuant to Clause 13.3.1, the terms of the Cure Plan have not been agreed within the period stated in the Cure Notice or if the actions specified in a Cure Plan approved by the Scottish Ministers to be taken by the Operator shall not have been taken and the matters referred to in the Cure Plan have not otherwise been resolved to the satisfaction of the Scottish Ministers within the period specified in the Cure Plan;

- (f) if, the Council shall fail to spend the Grant for the purposes specified in Clause 3;

- (g) if the Council shall at any time fail to fund its share of Eligible Capital Costs and any other costs of the Project.

13.2 Cure

13.2.1 The Scottish Ministers may at any time issue a Cure Notice in accordance with Clause 13.3.1 if:-

- (a) the Council shall fail to supply the Reports and comply with the Application procedures specified in Annex 1.

- (b) the Council shall fail to comply with any of its obligations under this Agreement;

- (c) the occurrence of any event which allows or which with the lapse of time would allow any party to a Major Trams Contract to terminate the relevant contract before its natural expiry date or to exercise any other remedy thereunder;
- (d) there shall occur an Event of Default or any event or series of events which the Scottish Ministers (acting reasonably) consider could cause an Event of Default to occur.

13.3 Cure Notice and Cure Plan

13.3.1 In this Agreement a **Cure Notice** means a notice by the Scottish Ministers to the Council requiring the Council, in consultation with the Scottish Ministers to submit and agree within 10 Business Days (or such longer period, to be specified in the Cure Notice, as the Scottish Ministers may require having regard to the matters referred to in the Cure Notice) a programme of action which will, if performed, cure or remedy or otherwise resolve (to the extent reasonably practicable in the context of the Project as a whole) the matters referred to in the Cure Notice to the satisfaction of the Scottish Ministers within such period acceptable to the Scottish Ministers as is reasonable in the circumstances.

13.3.2 In this Agreement a **Cure Plan** means the programme of action referred to in Clause 13.3.1.

13.3.3

- (a) When the Cure Plan (as presented or amended to meet the requirements of the Scottish Ministers) has been approved by the Scottish Ministers (which approval will only be withheld if the Cure Plan will not cure, remedy or otherwise resolve the matters referred to in the Cure Notice to the reasonable satisfaction of the Scottish Ministers) the Council will implement the Cure Plan according to its terms and all to the satisfaction of the Scottish Ministers (acting reasonably)
- (b) If at any time the Scottish Ministers (acting reasonably) are not satisfied with the progress being achieved by the Council in relation to the Cure Plan or the Operator fails to implement the Cure Plan in accordance with its terms, then the Scottish Ministers may by notice to the Council declare that the payment of the Grant shall be suspended whereupon the liability of the Scottish Ministers in respect of the Grant shall be suspended forthwith. The liability of the Scottish Ministers in respect of the Grant, if suspended, shall be reinstated upon the implementation of the Cure Plan to the satisfaction of the Scottish Ministers or otherwise as the Scottish Ministers may decide. During any period of suspension the Scottish Ministers may, at their sole discretion, make advances to the Council in