



Transport Scotland Internal

Period Report

Project Title:
Edinburgh Tram Network

Reporting Period:
Period 07 -2007/08

Transport Scotland Project Manager:
John Ramsay

Report produced by:

For and on behalf of City of Edinburgh Council

Signature:.....

Date:.....

This has been part completed for illustrative purposes.

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Headlines - Concerns, issues or risks could fall under funding

Type	Description	Action	IS	Owner	Period
O ◆	Communications Strategy submission which was a condition of the £60m grant (March 07) has been received on 15.10.07 as part of the FBC v1 submission.	TS (project team and Comms Manager) to review and feed back any issues and propose wording around Comms protocol for grant letter.		PM	1
R ◆	Opportunity and Risk estimates – detail and value not presented in line with TS reporting requirements.	TS PM and TS Risk Manager to address is forthcoming period.		PM	2
C ◆	Accrual levels remain high.	Meeting held between CEC & TS officials 18.10.07 at which TS requested in light of additional funding potentially being required by CEC in current FY it is imperative that current accrual levels are reduced.		PM/DHOMP	6
C ◆	Absence of any substantiation of the required circa £80m by CEC for remaining 6 weeks of FY 07/08.	Meeting held between CEC & TS officials 18.10.07 at which TS requested and CEC agreed to provide detail to the £80m by end Oct '07.		PM/DHOMP	7
C ◆	Period 6 to period 7 variance in year end forecasts. (Downturn of £7m from £164m to £157m).	As above the final year end forecast will need to be finalised as part of the substantiation exercise being undertaken by CEC.		PM/DHOMP	7
C ◆	There is a degree of dispute surrounding Parliamentary costs. These are currently being treated by TS as costs to the job and therefore would form part of the £500m. This is still under investigation.	This issue was discussed at meeting on 18.10.07. TS agreed to carry on investigating this as part of the grant letter development as the remaining funds figure will need to be incorporated in this.		PM/DHOMP	7
O ◆	FBCv1 received 8.10.07. Period 7 Promoter report highlights in Key Milestones section that there is a requirement by TS to approve the FBC.	TS PM to reiterate at week 2 meeting that TS are not part of the FBCv1 approval process. CEC are responsible for endorsing the FBC.		PM/DHOMP	7

Guidance for Completion:

Specify Type :

Legend for Intervention Strategy (IS)

Promoter

Green:

Intervention by TS Senior Management required but not urgent, within 1 to 6 periods.

C-Cost, F-Funding, R-Risk, T-Time, Q-Quality, A-All, O-Other

No intervention required at this point. Resolution of actions with TS Project Team &

Yellow:

Red:

Urgent Intervention by TS Senior Management required, within 1 to 3 periods.

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Past and Planned Activity

Bullet points noting significant achievements in the reporting period and planned activities for the next period

Achievements in the Period	Activities in the next period
<ul style="list-style-type: none"> OGC - OGC3 gateway: Implementation conducted between 1st & 4th October. The project was given a Green Status. 8 recommendations have been made and an action plan for close out has been developed. FBC – FBCv1 was endorsed by the TPB on 15.10.07 and issued to CEC on 18.10.07. Infraco/Tramco – Negotiation and evaluation of Infraco bids now complete. Recommendation for both Infraco and Tramco preferred bidders was endorsed by the TPB on 15.10.07. MUDFA – Potential issues related to the delayed commencement of AMIS works have been discussed in detail with AMIS resulting in an agreed way forward and agreement in principle between the parties. Funding Letter – Assurance letter of up to £500m funding issued from TS Chief Exec to CEC Chief Exec 17.10.07 Design – Advanced works – Little planned activity reported for this period. IPR2 – Contract award made to RJ McLeod and mobilisation underway. Work due to commence end Oct '07. Network Rail Property Agreements – Progressing with no major issues reported. Network Rail Immunisation – Progressing with no major issues reported. Traffic Mgt – Progressing with no major issues reported. 	<ul style="list-style-type: none"> Award of mobilisation contracts for Infraco and Tramco; SDS programme for IFC drawing issue – this is a significant risk to maintaining continuity of work for MUDFA team; NR immunisation and equipment relocation agreements to be progressed as programmed; The terms of the funding agreement need to be agreed giving protection against default to both parties and reassurance to bidders; Resolution of Forth Ports design issues; SGN review at technical level ongoing and commercial issues to be resolved; BT cabling and jointing programme to align with MUDFA Rev 06 programme; and SGN commercial agreement – Expected to be finalised for Willie Gallagher / Mel Karam agreement in early November 2007.

Risk & Opportunity Management Commentary

Focus on the management of the process i.e. is there one, is it joined up, is it effective, are actions completed

Risk	Opportunity
OGC risk review for project gave positive feedback on levels of risk and risk process of the project. A review of the content of this report would be useful.	Still no real evidence of the Opportunity management procedure. Although it is being run through a value engineering process, have the proposed savings been factored in to the current DBFM estimate? The promoter report does not currently give any detail of how the proposed £22.9m remaining in potential saving would be achieved and what the savings consist of.

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Schedule Milestones

The agreed baseline programme reference for this project is that given in the Period 3 report.

Key Milestone	No.	Baseline Date	Act/Fcast Date	Commentary on Key Milestones:
Approval of DFBC by CEC	1	21 Dec 06	21 Dec 06	FBC v1 received by TS 8.10.07. TS Project Team have circulated to internal stakeholders in order to carry out a high level review to highlight any major concerns/showstoppers in line with Ministerial requirements.
Approval of DFBC by Transport Minister – approval and funding for utility diversions	2	16 Mar 07	16 Mar 07	
TRO process commences	3	14 Dec 07		TS are concerned by Promoter's entry against Key Milestone no 14. TS remain uninvolved in the formal approval of the FBC. See Headlines section for TS action.
Tramco – Complete initial evaluation / negotiation	4	09 Mar 07	09 Mar 07	
MUDFA – Completion of pre-construction period of MUDFA contract	5	30 Mar 07	30 Mar 07	
MUDFA – Commencement of utility diversions	6	02 Apr 07	02 Apr 07	
Infraco – Return of stage 2 bids	7	08 May 07	08 May 07	
Tramco – Appointment of recommended Preferred Bidder	8	21 Sep 07	20 Sep 07	
Infraco – Completion of evaluation / negotiation of bid	9	10 Sep 07	25 Sep 07	
Infraco – Appointment of recommended Preferred Bidder.	10	25 Sep 07	25 Oct 07	
Tramco / Infraco – Facilitation of novation negotiation	11	22 Oct 07	22 Oct 07	
Tramco / Infraco – Final negotiation and appointment	12	11 Jan 08	11 Jan 08	
Infraco – Negotiation of Phase 1b complete.	13	30 Nov 07	30 Nov 07	
Approval of FBC by CEC and TS – Approval and funding for Infraco / Tramco	14	09 Jan 08	10 Jan 08	
Tramco / Infraco – Award following CEC / TS approval and cooling off period.	15	28 Jan 08	28 Jan 08	
Construction commences on Phase 1a	16	26 Feb 08	26 Feb 08	
TRO process complete	17	19 Jun 09	16 Dec 09	
Construction commences on Phase 1b	18	29 Jun 09	29 Jun 09	
Construction complete Phase 1a	19	08 Jul 10	08 Jul 10	
Operations commence Phase 1a	20	Feb 11	Feb 11	
Construction complete Phase 1b	21	Jun 11	Jun 11	
Operations commence Phase 1b	22	Dec 11	Dec 11	

Guidance for Completion:

Legend for colouring of Act / Fcast date text

Act / Forecast date is ahead or in line with baseline

Slight slippage – readily recoverable with action.

Notable / significant slippage – difficult to recover, even with action.

Green:

Yellow:

Red:

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Project Financial Information (Part 1) all figures are in £m

DASHBOARD

FY 07/08			FY 07/08			Project to Date			
COWD Period Actual (to TS)			COWD YTD Performance (to TS)						
Actual	Planned	Variance	Actual	Planned	Variance	COWD	TS Auth Fund	3rd Party Fund	TS PAID
6.504	9.277	-2.773	43.650	51.984	-8.334	107.616	125.906	2.787	0.000

TS Funding Check	Promoter AFC to TS		Total Project Funding Check	Latest EST		Total AFC
	Original	AFC to TS		Original	Latest EST	
Mid Point	0.000	0.000	0.000	0.000	0.000	0.000
Maximum	0.000	498.060	0.000	0.000	0.000	0.000

TS Funding Commitment as announced by Minister

TS Funding Commitment as announced by Minister plus third party funding

FINANCIAL COMMENTARY:

Phase 1a only

TS FUNDING COMMITMENT INFORMATION		Comment	
A	Funding Announcement Date	30/03/2006	
B	Relevant Time	Q1 2006	
C	Range	x to x	
D	Mid Point	0	
E	Escalated Funding to project end date	0	

TS FUNDING AUTHORISED		Expiry Date	Current Limit	COWD
ALL Years				
Grant	Description of Grants/IA's Issued to Date			
1			0.000	0.000
2			0.000	0.000
3			0.000	0.000
TOTAL			0.00	0.00

TS ELEMENT SPEND BREAKDOWN	PLANNED/EMERGING/FORECAST			Estimated Cost			Actual Cost/Forecast			Variance
	Original Estimate	Escalated Original Estimate	Escalated Latest Estimate	Cost Of Work Done (COWD)	Forecast to Completion	Anticipated Final Costs (AFC)	AFC v ELE			
Relevant Baseline date :	xx/xx/20xx									
General Overall	500.400	500.400	28.548	18.455	10.092	28.548	0.000			
Procurement Consultant	0.000	0.000	68.609	30.267	38.342	68.609	0.000			
Design	0.000	0.000	23.683	18.836	4.848	23.683	0.000			
Financial Issues/Funding/Procurement Strategy	0.000	0.000	2.258	1.760	0.498	2.258	0.000			
Parliamentary Process/Approvals	0.000	0.000	0.329	0.329	0.000	0.329	0.000			
Procurement Construction Works	0.000	0.000	0.000	0.000	0.000	0.000	0.000			
Construction Works	0.000	0.000	325.658	18.245	307.413	325.658	0.000			
Testing & Commissioning	0.000	0.000	0.000	0.000	0.000	0.000	0.000			
Handing Over & Service Operations	0.000	0.000	0.000	0.000	0.000	0.000	0.000			
NOP/Rail Projects Interface (Promoters View)	0.000	0.000	0.000	0.000	0.000	0.000	0.000			
Interfacing Developments	0.000	0.000	0.000	0.000	0.000	0.000	0.000			
Risk	0.000	0.000	48.974	0.000	48.974	48.974	0.000			
Opportunity (Negative Value)	0.000	0.000	0.000	0.000	0.000	0.000	0.000			
OB/Contingency	0.000	0.000	0.000	0.000	0.000	0.000	0.000			
Total	500.400	500.400	498.060	87.892	410.167	498.060	0.000			

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Project Financial Information (Part 2) all figures are in £m

Detailed Financial Information

Edinburgh TRAMS Network

FY 07/08

Period Nr:

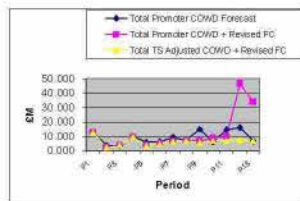
Phase 1a only

Current Year Budget	P1	P2	P3	P4	P5	P6	P7	P8	P9	P10	P11	P12	P13	Total
1 TS Funding Spend	8,605	9,150	9,324	10,289	13,756	4,937	4,672	9,544	9,544	9,544	9,544	9,544	9,547	118,000
2 3rd Party Funding	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
3 Total Funding Forecast	8,605	9,150	9,324	10,289	13,756	4,937	4,672	9,544	9,544	9,544	9,544	9,544	9,547	118,000
4 Promoter COWD Forecast (to TS)	12,808	3,860	3,566	9,841	6,115	6,517	9,277	7,502	14,931	6,281	14,628	16,147	6,733	118,206
5 TS Adjustment	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
6 TS Adjusted COWD Forecast (to TS)	12,808	3,860	3,566	9,841	6,115	6,517	9,277	7,502	14,931	6,281	14,628	16,147	6,733	118,206
7 Promoter COWD Forecast (to 3rd Party)	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
8 TS Adjustment	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
9 TS Adjusted COWD Forecast (to 3rd Party)	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
10 Total Promoter COWD Forecast	12,808	3,860	3,566	9,841	6,115	6,517	9,277	7,502	14,931	6,281	14,628	16,147	6,733	118,206
11 Total TS Adjusted COWD Forecast	12,808	3,860	3,566	9,841	6,115	6,517	9,277	7,502	14,931	6,281	14,628	16,147	6,733	118,206
12 Invoice Costs (to TS) + Revised FC	12,808	2,289	3,899	9,635	3,777	4,793	6,504	7,050	6,858	6,940	10,020	46,880	33,960	167,212
13 Accrual Costs (to TS)	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
14 Promoter COWD + Revised FC to TS	12,808	2,289	3,899	9,635	3,777	4,793	6,504	7,050	6,858	6,940	10,020	46,880	33,960	167,212
15 TS Adjustment	0,000	0,000	0,000	0,000	0,000	-0,054	0,000	0,000	-1,000	-2,000	-3,000	-39,000	-27,000	-72,054
16 TS Adjusted COWD + Revised FC to TS	12,808	2,289	3,899	9,635	3,777	4,739	6,504	7,050	5,858	4,940	7,020	7,680	6,960	85,158
17 Invoice Costs (to 3rd Party) + Revised FC	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
18 Accrual Costs (to 3rd Party)	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
19 Promoter COWD + Revised FC to 3rd Party	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
20 TS Adjustment	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
21 TS Adjusted COWD + Revised FC to 3rd Party	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
22 Total Promoter COWD + Revised FC	12,808	2,289	3,899	9,635	3,777	4,793	6,504	7,050	6,858	6,940	10,020	46,880	33,960	167,212
23 Total TS Adjusted COWD + Revised FC	12,808	2,289	3,899	9,635	3,777	4,739	6,504	7,050	5,858	4,940	7,020	7,680	6,960	85,158
24 Variance Line 4 to Line 14	0,000	-1,571	0,333	-0,206	-2,338	-1,734	-2,773	-0,452	-8,073	7,659	-4,609	30,533	27,227	39,006
25 Variance Line 7 to Line 19	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000
26 Variance Line 10 to Line 22	0,000	-1,571	0,333	-0,206	-2,338	-1,734	-2,773	-0,452	-8,073	7,659	-4,609	30,533	27,227	39,006
27 Variance Line 11 to Line 23	0,000	-1,571	0,333	-0,206	-2,338	-1,734	-2,773	-0,452	-8,073	7,659	-7,608	-8,467	0,227	-33,048

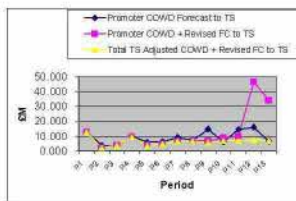
Next Year Forecast 08/09 (Updated 4 weekly)	01	02	03	04	Total	TS Financial Commentary - FY08/09 Onwards
28 TS Funding Spend	32,500	32,500	32,500	32,500	130,000	
29 3rd Party Funding	0,000	0,000	0,000	0,000	0,000	
30 Total Funding Spend Forecast	32,500	32,500	32,500	32,500	130,000	
31 Promoter COWD (to TS)	24,764	28,357	18,175	41,347	112,622	
32 TS Adjustment	13,500	13,500	13,500	13,500	54,000	
33 TS Adjusted COWD (to TS)	38,264	41,857	31,675	54,847	166,622	
34 Promoter COWD (to 3rd Party)	2,443	2,803	1,797	4,089	11,138	
35 TS Adjustment	0,000	0,000	0,000	0,000	0,000	
36 TS Adjusted COWD (to 3rd Party)	2,443	2,803	1,797	4,089	11,138	
37 Total Promoter COWD Forecast	27,214	31,140	19,971	45,437	123,761	
38 Total TS Adjusted COWD Forecast	40,714	44,640	33,471	58,937	177,761	

ALL Years (Escalated) (Updated 4 weekly)	FY03/04	FY04/05	FY05/06	FY06/07	FY07/08	FY08/09	FY09/10	FY10/11	FY11/12	FY12/13	FY13/14	FY14/15	FY15/16	TOTAL
39 TS Funding Spend	0,000	3,093	19,315	42,766	119,000	130,000	165,000	21,527	0,000	0,000	0,000	0,000	0,000	500,000
40 3rd Party Funding	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	1,000
41 Total Funding Spend Forecast	0,000	3,093	20,315	42,766	119,000	130,000	165,000	21,527	0,000	0,000	0,000	0,000	0,000	501,000
42 Promoter COWD (to TS)	0,000	3,093	8,106	30,202	157,212	112,622	128,208	24,527	4,326	0,277	0,000	0,000	0,000	468,573
43 TS Adjustment	0,000	-3,316	5,394	-3,668	-72,054	-54,000	-18,000	0,000	0,000	0,000	0,000	0,000	0,000	-21,511
44 TS Adjusted COWD (to TS)	0,000	0,000	12,500	33,868	85,158	58,622	110,208	24,527	4,326	0,277	0,000	0,000	0,000	447,062
45 Promoter COWD (to 3rd Party)	0,000	0,000	2,558	0,229	0,000	11,138	12,680	2,426	0,426	0,027	0,000	0,000	0,000	29,486
46 TS Adjustment	0,000	0,000	-1,538	-0,229	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	0,000	-1,767
47 TS Adjusted COWD (to 3rd Party)	0,000	0,000	1,020	0,000	0,000	11,138	12,680	2,426	0,426	0,027	0,000	0,000	0,000	27,699
48 Total Promoter COWD Forecast	0,000	3,093	10,664	30,431	157,212	123,761	140,888	26,953	4,754	0,304	0,000	0,000	0,000	499,060
49 Total TS Adjusted COWD Forecast	0,000	3,093	14,500	33,868	85,158	117,761	158,888	26,953	4,754	0,304	0,000	0,000	0,000	517,760

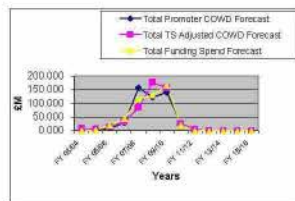
GRAPH 1 - TOTAL CURRENT YEAR



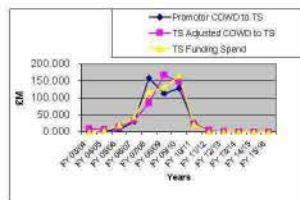
GRAPH 2 - TS ONLY CURRENT YEAR



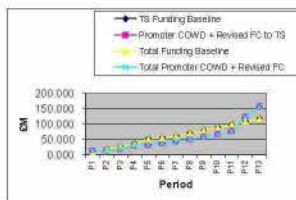
GRAPH 3 - TOTAL ALL YEARS



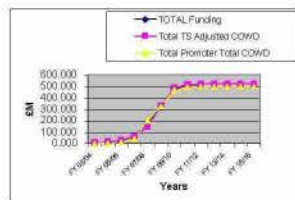
GRAPH 4 - TS ONLY ALL YEARS



GRAPH 5 - CUMULATIVE CURRENT YEAR



GRAPH 6 - CUMULATIVE ALL YEARS



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The 4 weekly periods and Application Dates for Financial Year 2007 – 2008 are:-

Period		Application Date
Period 1	28-Apr-07	4-May-07
Period 2	26-May-07	01-Jun-07
Period 3	23-Jun-07	29-Jun-07
Period 4	21-Jul-07	27-Jul-07
Period 5	18-Aug-07	24-Aug-07
Period 6	15-Sep-07	21-Sep-07
Period 7	13-Oct-07	19-Oct-07
Period 8	10-Nov-07	16-Nov-07
Period 9	08-Dec-07	14-Dec-07
Period 10	05-Jan-08	11-Jan-08
Period 11	02-Feb-08	08-Feb-08
Period 12	01-Mar-08	07-Mar-08
Period 13	29-Mar-08	04-Apr-08

Period 13 will include the Council's best estimate for the 2 days to 31 March 2008.

- 4.2.3 The Scottish Ministers will give notice of the four weekly period end dates and application dates for each Financial Year no later than the end of the previous Financial Year.

**Period End Dates 2009/2008
(Period End Dates for
subsequent Financial Year
will be separately advised)**

Period 1	28-Apr-07	
Period 2	26-May-07	
Period 3	23-Jun-07	
Period 4	21-Jul-07	
Period 5	18-Aug-07	
Period 6	15-Sep-07	
Period 7	13-Oct-07	
Period 8	10-Nov-07	
Period 9	08-Dec-07	
Period 10	05-Jan-08	
Period 11	02-Feb-08	
Period 12	01-Mar-08	
Period 13	29-Mar-08	(plus best estimate for 2 days up to 31 Mar 08)

Schedule 14 Step Down Summary of All Agreements and Undertakings 15 April 2008

Party	Area of Concern	Tram Line	undertaking/ agreement/ comfort	Step Down into Schedule 14 of INFRACO Contract	If Not in Schedule 14 Why Not?
RBS	Gogarburn Hospital	ETL2	s75 agreement	N	Agreement being drafted to be included in Schedule 14 later
Western General Hospital	Western General Hospital	ETL1	undertaking	N	Bus Services - not relevant to INFRACO
Edinburgh Masonic Club	Shrub Place, Leith Walk	ETL1	assurance	N	Covered off under COCP
Campbellton, Mr John	8/10 Constitution Street	ETL1	comfort	N	Covered off under COCP
Cardpoint	Ocean Terminal	ETL1	Comfort	N	Covered off under COCP
Caversham Trading Ltd	Newkirkgate Shopping Centre	ETL1	comfort	N	Covered off under COCP
CEC (Thomson, G)	Leith Walk/Smiths Place	ETL1	Comfort	N	Covered off under COCP
Clowes Development	9 Coates Crescent	ETL1	comfort	N	Covered off under COCP
Cocks, Mr KV	4/3 Constitution Street	ETL1	comfort	N	Covered off under COCP
Conell-Guarino, Ms Irene	17/6 Timber Bush	ETL1	comfort	N	Covered off under COCP
Connor, Ms C	2/7 Constitution Place	ETL1	comfort	N	Covered off under COCP
	38/2 Queen Charlotte				
Craske, J&A	St/Constitution St	ETL1	Comfort	N	Covered off under COCP
Cullen, Mr	60/6 Balbirnie Place	ETL1	comfort	N	Covered off under COCP
David Flatman Ltd	Gyle	ETL2	comfort	N	Covered off under COCP
Debenhams	Ocean Terminal	ETL1	comfort	N	Covered off under COCP
Degg, Mr	15/6 Rennie's Isle	ETL1	Comfort	N	Covered off under COCP
Douglas, Ms F	7/6 Tower Street	ETL1	comfort	N	Covered off under COCP
Drew, Ms KJ	1 Constitution Place	ETL1	comfort	N	Covered off under COCP
Duncan, Mr&Mrs	9/1 Rennie's Isle	ETL1	Comfort	N	Covered off under COCP
Euro-hostels, Mr Ian Curry	Princes Street	ETL1	comfort	N	Covered off under COCP
Fleming, Ms L	33/4 Ocean Drive	ETL1	comfort	N	Covered off under COCP
Foster, Mr C	5/9 Tower Street	ETL1	comfort	N	Covered off under COCP
Garlands Florist	29 Elm Row	ETL1	comfort	N	Covered off under COCP
Gaynor, Ms Sheila	1/20 Timberbush	ETL1	comfort	N	Covered off under COCP
Germi, Mr Francesco	42 2F2 Elm Row	ETL1	comfort	N	Covered off under COCP
Gilbert, G	17/5 Rennie's Isle	ETL1	Comfort	N	Covered off under COCP
Gillon, Ms AM	11/2 Tower Street	ETL1	comfort	N	Covered off under COCP
Haggerty, L & Hill, L	11/6 Tower Street	ETL1	Comfort	N	Covered off under COCP
Harkness, Mr Alistair	7a Atholl Place	ETL1	comfort	N	Covered off under COCP
Harte, Ms Deirdre	143/6 Constitution Street	ETL1	comfort	N	Covered off under COCP
Hetherington, Mr M	Flat 18/8 Tower Street	ETL1	comfort	N	Covered off under COCP
Innes, Mr E	4/28 Constitution Street	ETL1	comfort	N	Covered off under COCP
Irish Life Assurance	Ocean Terminal	ETL1	comfort	N	Covered off under COCP
Keen, Miss Rachel	8/7 Constitution Street	ETL1	comfort	N	Covered off under COCP
Laird, Mr & Mrs	1/11 Ocean Way	ETL1	comfort	N	Covered off under COCP
Lang, Prof M	12/35 Ocean Drive	ETL1	comfort	N	Covered off under COCP
Low, Mr & Mrs	Ocean Drive	ETL1	comfort	N	Covered off under COCP
Mad Jacks Back	36 Elm Row	ETL1	comfort	N	Covered off under COCP
Marsh, Ms L	8/14 Constitution Street	ETL1	comfort	N	Covered off under COCP
McKeown, Mr	31 Coltbridge Avenue	ETL1	comfort	N	Covered off under COCP
McLeod, Ms Carolyn	18 Craigleith Road	ETL1	comfort	N	Covered off under COCP
McNaught, Mrs Lee-Ann	138/2 Constitution Street	ETL1	comfort	N	Covered off under COCP
New Look	Ocean Terminal	ETL1	comfort	N	Covered off under COCP
O'Carroll, D	1 Cambridge Gardens (Leith Wa	ETL1	comfort	N	Covered off under COCP
	Caroline Park House, Caroline				
Parnell, Mr & Mrs A	Park Avenue	ETL1	comfort	N	Covered off under COCP
Peiffer, Ms	9/2 Tower Street	ETL1	comfort	N	Covered off under COCP
Pritchard, Mr A	Union Place	ETL1	comfort	N	Covered off under COCP
Rennie, Mrs F	14c Constitution Street, Tower S	ETL1	comfort	N	Covered off under COCP
Reynolds, Ms HT	27 Balbirnie Place	ETL1	comfort	N	Covered off under COCP
Robertson, Ms Jane	56/1 Balbirnie Place	ETL1	comfort	N	Covered off under COCP
Rooney, C	13 Trinity Crescent	ETL1	comfort	N	Covered off under COCP
Santer, Mr N	1/14 Ocean Way	ETL1	comfort	N	Covered off under COCP
Scotland, Ms Samantha	4/10 Constitution Street	ETL1	comfort	N	Covered off under COCP
Scott, Mr Marshall	Ocean Drive	ETL1	comfort	N	Covered off under COCP
Seath, Mr & Mrs	Castle Gogar Estate	ETL2	comfort	N	Covered off under COCP
Sheehan, Ms Natalie	4/6 Constitution Street	ETL1	comfort	N	Covered off under COCP
Shirley, Mr I	18/5 Timber Bush	ETL1	comfort	N	Covered off under COCP
Smith, Mrs	17/2 Rennie's Isle	ETL1	comfort	N	Covered off under COCP
Sprott, Ms Christina	10/5 Tower Place	ETL1	comfort	N	Covered off under COCP
Stansfield, Mr Nick	30 Haddington Place	ETL1	comfort	N	Covered off under COCP
Staples UK Retail Ltd	Hermiston Gait	ETL2	comfort	N	Covered off under COCP
Starbucks	Gyle	ETL2	comfort	N	Covered off under COCP
Stevenson, Mr J	61 Baird Drive	ETL2	comfort	N	Covered off under COCP
Syme, Mr Christian	58/3 Balbirnie Place	ETL1	comfort	N	Covered off under COCP
Torrent, Mr Peter	15 Roseburn Street	ETL2	comfort	N	Covered off under COCP
Traditional Barbers	349 Leith Walk	ETL1	comfort	N	Covered off under COCP
Williams, Mrs B	18 Tower Street	ETL1	comfort	N	Covered off under COCP
Yes Indeed - Dead Sea Spa	Ocean Terminal	ETL1	comfort	N	Covered off under COCP
Collinsons Ceramics	31 Roseburn Street	ETL2	Position statement	N	Covered off under COCP
Pearson, Ms Judith	5/8 Rennie's Isle, Ocean Drive	ETL1	Position statement	N	Covered off under COCP
Edinburgh Leisure	Carricknowe Golf Course	ETL2	undertaking	N	Covered off under COCP
Pearson, Ms Judith	5/8 Rennie's Isle, Ocean Drive	ETL1	undertaking	N	Covered off under COCP
CGM Edinburgh Ltd	Citypoint, Haymarket Terrace	ETL1	agreement	N	Dealt with under Bill Amendment
Kenmore Capital	Citypoint, Haymarket Terrace	ETL1	agreement	N	Dealt with under Bill Amendment
Joy, Mr & Mrs	6a Picardy Place	ETL1	assurance	N	Design consultation obligation - SDS
Hodkinson Mr & Mitchell Ms	17/21 Roseburn Maltings	ETL1	comfort	N	Design consultation obligation - SDS
Hudson, Mr & Mrs N	25 Craigleith Crescent	ETL1	comfort	N	Design consultation obligation - SDS
Kane, Mrs	4 Iona Street Lane	ETL1	Comfort	N	Design consultation obligation - SDS
Minto, Mr	7/4 Roseburn Maltings	ETL1	comfort	N	Design consultation obligation - SDS
Murphy, Mr & Mrs	11 Upper Coltbridge Terrace	ETL1	comfort	N	Design consultation obligation - SDS
Smith, Ms Lyndsey	17/6 Roseburn Maltings	ETL1	comfort	N	Design consultation obligation - SDS
Wilken, JB	23 Starbank Road	ETL1	comfort	N	Design consultation obligation - SDS
Clarke, Mr Mark	11a Craigleith Drive	ETL1	undertaking	N	Design consultation obligation - SDS
Murphy, Mr & Mrs	11 Upper Coltbridge Terrace	ETL1	undertaking	N	Design consultation obligation - SDS
MRM Coachworks	23 Roseburn Street	ETL2	comfort	N	LLAU/Compensation Matter
CALA Management	Constitution Place	ETL1	closure	N	No obligation on INFRACO
Custom Projects, Mr Kelly	37 Roseburn Street	ETL2	closure	N	No obligation on INFRACO
Dewar, Mr R	17/6 New Orchard Field	ETL1	closure	N	No obligation on INFRACO
Frame, Mr S	15/6 Telford Drive	ETL1	closure	N	No obligation on INFRACO
Gray's Mill Coachworks	Unit 8, 37 Roseburn Street	ETL2	closure	N	No obligation on INFRACO

Schedule 14 Step Down Summary of All Agreements and Undertakings 15 April 2008

Party	Area of Concern	Tram Line	undertaking/ agreement/ comfort	Step Down into Schedule 14 of INFRACO Contract	If Not in Schedule 14 Why Not?
Kaur, Mrs D	4 East Mains Holdings, Ingliston	ETL2	closure	N	No obligation on INFRACO
MRM Coachworks	23 Roseburn Street	ETL2	closure	N	No obligation on INFRACO
National Car Parks	Edinburgh Airport Car Park	ETL2	closure	N	No obligation on INFRACO
NCR Vanguard	Roseburn Street	ETL2	closure	N	No obligation on INFRACO
Nonwich Union	Edinburgh Airport	ETL2	closure	N	No obligation on INFRACO
PD Labels, Mrs Patricia Dewar	Unit 5, 37 Roseburn Street	ETL2	closure	N	No obligation on INFRACO
Scott, Mr Marshall	Ocean Drive	ETL1	closure	N	No obligation on INFRACO
Scottish Enterprise	Haymarket Stn Car Park	ETL1	closure	N	No obligation on INFRACO
TNT Express Ltd	Edinburgh Airport	ETL2	closure	N	No obligation on INFRACO
Vericolor Limited	Clifton Terrace	ETL1	closure	N	No obligation on INFRACO
Viking International (also known as Stepgrade Motors)	13-21 Roseburn Street	ETL2	closure	N	No obligation on INFRACO
Abercastle Holdings	5 Tower Place	ETL1	comfort	N	No obligation on INFRACO
Bail, EJ	44 Balbirnie Pl	ETL2	Comfort	N	No obligation on INFRACO
Barker, Ms Gabrielle	8 Craighleith Hill Row	ETL1	comfort	N	No obligation on INFRACO
Baxters	Ocean Terminal	ETL1	comfort	N	No obligation on INFRACO
BHS	Ocean Terminal	ETL1	comfort	N	No obligation on INFRACO
Brewster, Mr	Gogar	ETL2	Comfort	N	No obligation on INFRACO
Campbell, Mr C & Mrs	35 Ocean Drive	ETL1	comfort	N	No obligation on INFRACO
Donoghue, Mr D	31 Starbank Road	ETL1	comfort	N	No obligation on INFRACO
Duff, Mr G	143 Constitution Street	ETL1	comfort	N	No obligation on INFRACO
Duthie, Ms Margaret	19/22 Roseburn Maltings	ETL1	comfort	N	No obligation on INFRACO
Forrest, M	27/1 Starbank Rd	ETL1	Comfort	N	No obligation on INFRACO
Ghulam, Mr	25 Telford Drive	ETL1	comfort	N	No obligation on INFRACO
Munro, Mr I	Balbirnie Place	ETL1	comfort	N	No obligation on INFRACO
Pender, Mr	Granton Harbour (Corinthian Quay)	ETL1	comfort	N	No obligation on INFRACO
Redpath McLean	20-22 Russell Road	ETL2	comfort	N	No obligation on INFRACO
WEL	West Harbour Road	ETL1	comfort	N	No obligation on INFRACO
Caledonian Ale House	Haymarket Terrace	ETL1	Completion Statement etc (for purchase)	N	No obligation on INFRACO
Frank Earley, Prolaminates	41 Roseburn Street	ETL2	Position statement	N	No obligation on INFRACO
Capital City Homes	Stenhouse Avenue West	ETL2	s75 agreement	N	No obligation on INFRACO
Clydeside Investment Properties	Saughton Crescent	ETL2	s75 agreement	N	No obligation on INFRACO
Granton Harbour (Forth Ports)	Tower Place, Leith, Edinburgh	ETL1	s75 agreement	N	No obligation on INFRACO
NEL S75	Edinburgh Park	ETL2	s75 agreement	N	No obligation on INFRACO
NEL S75 - Hermiston Gait Retail Unit	Edinburgh Park	ETL2	s75 agreement	N	No obligation on INFRACO
Secondsite - Port Greenwich	West Granton Road	ETL1	s75 agreement	N	No obligation on INFRACO
Skill Express	13-19 Orwell Pl	ETL2	s75 agreement	N	No obligation on INFRACO
Tuscan Dawn	Eglington Crescent	ETL2	s75 agreement	N	No obligation on INFRACO
Redpath McLean	20-22 Russell Road	ETL2	undertaking	N	No obligation on INFRACO
NTL	Routewide (Apparatus)	route wide	agreement	N	Now Telewest, utilities - Recommend inclusion in Schedule 14
Crown Estate Commissioners	Lower Granton Road	ETL1	agreement	N	Phase 2, therefore N/A
Dean, A & White, A	3/2 Trinity Crescent	ETL1	Comfort	N	Phase 2, therefore N/A
Drysdale, R	28 Primrose Bank Road	ETL1	Comfort	N	Phase 2, therefore N/A
Hannan, Ms & Spence, Mr	23 Starbank Rd	ETL1	Comfort	N	Phase 2, therefore N/A
White Mr Anthony & Dean Ms Ann	3/2 Trinity Crescent	ETL1	comfort	N	Phase 2, therefore N/A
BRB Residuary	Ratho	ETL2	agreement	N	Phase 3, therefore N/A
Grampian Country Foods/Marshall Food Group	Newbridge	ETL2	agreement	N	Phase 3, therefore N/A
McDonalds Restaurant	Newbridge Service Station	ETL2	agreement	N	Phase 3, therefore N/A
RBSI + Hanover Properties	Newbridge Industrial Estate	ETL2	agreement	N	Phase 3, therefore N/A
RHASS	Royal Highland Centre, Ingliston	ETL2	agreement	N	Phase 3, therefore N/A
Thames Rico	Newbridge Service Station	ETL2	agreement	N	Phase 3, therefore N/A
Hamilton Mr A & Sansom Ms J	200 Glasgow Road	ETL2	comfort	N	Phase 3, therefore N/A
Tosh, P & Willett, N	5/3 Starbank Road	ETL1	comfort	N	Phase 3, therefore N/A
Wilson, K	8 Middle Norton, Ingliston	ETL2	comfort	N	Phase 3, therefore N/A
McTighe, Ms L	6 Middle Norton Cottages	ETL2		N	Phase 3, therefore N/A
RBS			agreement	N	Recommend Step Down into Schedule 14
Beauchamp Investments	Royal Mail Sorting Office, 18 Russell Road	ETL2	undertaking	N	Recommend Step Down into Schedule 14
Western Harbour (Forth Ports)	Westen Harbour	ETL1	s75 agreement	N	See Forth Ports Agreement
BT	Routewide (Apparatus)	route wide	agreement	N	Utilities - Recommend inclusion in Schedule 14
Cable & Wireless	Routewide (Apparatus)	route wide	agreement	N	Utilities - Recommend inclusion in Schedule 14
Easynet Telecomms Ltd	Routewide (apparatus)	route wide	agreement	N	Utilities - Recommend inclusion in Schedule 14
Scottish Power			agreement	N	Utilities - Recommend inclusion in Schedule 14
Scottish Water	Routewide (SW Apparatus)	route wide	agreement	N	Utilities - Recommend inclusion in Schedule 14
Telewest			agreement	N	Utilities - Recommend inclusion in Schedule 14
Thus	Routewide (Thus Apparatus)	route wide	agreement	N	Utilities - Recommend inclusion in Schedule 14
Transco	Routewide (NB Gogar)	route wide	agreement	N	Utilities - Recommend inclusion in Schedule 14
ADM Milling	Chancelot Mill, Western Harbour	ETL1	agreement	Y	
Adshel	Routewide (bus stops)	route wide	agreement	Y	
BAA	Edinburgh Airport	ETL2	agreement	Y	
BAE Systems - Selex	2 Crewe Road North	ETL1	agreement	Y	
Clerical Medical Investment Group	Hermiston Gait Centre	ETL2	agreement	Y	
Forth Ports	Constitution Street to Granton Harbour	ETL1	agreement	Y	

Schedule 14 Step Down Summary of All Agreements and Undertakings 15 April 2008

Party	Area of Concern	Tram Line	undertaking/ agreement/ comfort	Step Down into Schedule 14 of INFRACO Contract	If Not in Schedule 14 Why Not?
FSH (Frogmore)	Near Edinburgh Airport	ETL2	agreement	Y	
Historic Scotland	Routewide (wide ranging)	route wide	agreement/protocol	Y	
Holyrood Elphinstone Group	Granton Harbour	ETL1	agreement	Y	
ICAS	Haymarket Yards	ETL1	agreement	Y	
Jenners (JPSE)	140 Balgreen Road	ETL2	agreement	Y	
Land Securities Trillium	Haymarket House	ETL1	agreement	Y	
Murrayfield Indoor Sports Centre	Roseburn Street	ETL2	agreement	Y	
NEL + EPML	Edinburgh Park	ETL2	agreement	Y	
Network Rail	Routewide (Railway & bridges)	route wide	agreement	Y	
NIL	Glasgow Rd (Gogar)	ETL2	agreement	Y	
NULAP	Haymarket Yards	ETL1	agreement	Y	
Ocean Terminal	Ocean Terminal Shopping Centre	ETL1	agreement	Y	
Royal Mail	Routewide (PO & Post Box)	route wide	agreement	Y	
Royal Yacht Britannia	Ocean Terminal	ETL1	agreement	Y	
Safeway-Morrisons	Gyle	ETL2	agreement	Y	
Scotrail	Routewide (NB Russell Rd)	route wide	agreement	Y	
Secondsite - Port Greenwich			agreement	Y	
SRU - not yet finalised	Roseburn Street	ETL2	agreement	Y	
Stakis Hotel (Edinburgh Airport)	Edinburgh Airport	ETL2	agreement	Y	
Stanley Casinos - not yet finalised	Ocean Drive	ETL1	agreement	Y	
Trustees of City Point	Citypoint, Haymarket Terrace	ETL1	agreement	Y	
UGC Properties	13 Roseburn Street	ETL2	agreement	Y	
Universities Superannuation Scheme (USS)	Gyle	ETL2	agreement	Y	
Verity Trustees	Haymarket Yards	ETL1	agreement	Y	
West Craigs Ltd (previously Meadowfield Developments Ltd)	Gogar	ETL2	agreement	Y	
Norman Downie and Kerr	130 Constitution Street	ETL1	closure	Y	
Alexander Latto Ltd	111-115 Constitution St	ETL1	comfort	Y	
Chris Holmes Cabinetmakers	Gogar Church, 194 Glasgow Rd	ETL2	comfort	Y	
Clarke, Mr&Mrs	28 Starbank Road	ETL1	Comfort	Y	
Edinburgh & Lothian Badger Group			comfort	Y	
Groathill Residents (re Bridge)			comfort	Y	
Haymarket Yards Ltd	Haymarket Yards	ETL1	comfort	Y	
Lothian Healthcare	139 & 141 Leith Walk	ETL1	comfort	Y	
Milne, O	Roseburn Corridor	ETL1	Comfort	Y	
Roseburn Garage	35 Roseburn Street	ETL2	comfort	Y	
Scottish Natural Heritage	Lower Granton Road	ETL1	comfort	Y	
Servisair UK Limited	Edinburgh Airport	ETL2	comfort	Y	
JB McLean Interiors	27 Roseburn Street	ETL2	Missive	Y	
Bourne, Ms Alison	32 Groathill Road South	ETL1	undertaking	Y	
Craik, Mrs Patricia	34 Groathill Road South	ETL1	undertaking	Y	
Police Box Coffee Bars	Picardy Place	ETL1	undertaking	Y	

Subject : Third Party Agreements and the Infraco Contract

Paper to : CEC

Date : 15th April 2008

Background

During the passage of the Tram Line 1 and Tram Line 2 Bills through Parliament a number of objections were received. These were dealt with in a number of ways as follows:

- Amendment incorporated into the bill and became part of the final Act (s).
- Mitigation dealt with through the Code of Construction Practice or Noise and Vibration Policy which became part of the Acts.
- Specific 3rd party agreement or letter of commitment put in place – total of 202 of these in place.
- Objection over-ruled

Compliance

tie has sought to ensure compliance with all commitments made in 1, 2, or 3 above by flowing these commitments, where appropriate, through to the Infraco contract. Infraco has a general obligation to comply with the Acts and therefore the COCP and the Noise and Vibration Policy. **tie** maintains a database of all the other 3rd party agreements and letters of commitment. DLA have had access to these to ensure appropriate elements are contained in the Schedule 13 of Infraco.

The matrix attached demonstrated for each third party agreement/letter the following:

- If it has been input to Infraco
- If not, the reason why

In summary:

202 Agreements or undertakings exist

- 47 are stepped down into Schedule 14
- 70 are dealt with under INFRACO's COCP Obligations – NO ACTION REQUIRED
- 10 are already within SDS Design Scope – NO ACTION REQUIRED
- 45 have no obligation on INFRACO – NO ACTION REQUIRED
- 15 relate to Phases 2 or 3 – NO ACTION REQUIRED
- 2 Are covered off under Bill Amendments – NO ACTION REQUIRED
- 9 Utility Agreements exist but are not stepped down into Infraco

- 4 Agreements (RBS, FP, SRU & Stanley Casinos) are in Schedule 14, but not in their final form

Infraco are likely to undertake some utility diversions where MUDFA are unable to do so. This will be instructed as a **tie** change. At the same time the 9 agreements with utility companies will be varied into Infraco as these are required for the implementation of such works.

The final RBS, Forth Ports, SRU and Stanley Casino agreements will be varied as a **tie** change once completed. There is low risk in that either budget provision has been made for these items or additional funding is being provided by that 3rd party.

Susan Clark



EDINBURGH TRAM NETWORK

CONTRACTUAL ALLOCATION OF RISKS IN THE DRAFT INFRACO CONTRACT

AS AT 22 APRIL 2008

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

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

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

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

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

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

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

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

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

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

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

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

Risk : Novation and Other Key Interfaces	Allocation		
	Public Sector	Private Sector	Shared
Infraco Contract to novate, assign or otherwise transfer the Tram Supply Agreement to tie , the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than tie or to any other person whose obligations are unconditionally guaranteed under the Tram Supply Agreement by such a person.			
[13.16] Failure to assist in obtaining a collateral warranty from Tram Maintainer where novation, assignation or other transfer has taken place.	✓		
[14.1] Failure to carry out and complete tie's Obligations (to be defined).	✓		
[15] Establishment of Local Codes of Construction Practice, identification and settlement of issues and resultant delay or disruption.	✓		
[15.1] Provision of assistance and method statements in relation to Local Codes of Construction Practice.		✓	
[16.2] Risks arising through the Asset Protection Agreement.		✓ (to cap)	

Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
[17.2] Occurrence and costs to the Infraco of an Operator Event to the extent the Infraco has not materially contributed to such event.	✓		
[17.3/17.4/17.7] Failure to mitigate (at reasonable inconvenience and cost), notify tie of or maintain reports of an Operator Event or matters which may precede an Operator Event.		✓	
[17.5] Arranging meeting and obtaining Operator's cooperation with agreed corrective measures following an Operator Event.	✓		
[17.8] Failure to, from the date of the Agreement, take into account comments of the Operator when refining Design and failure to deliver Infraco comments on functional and maintainability issues to tie and the Operator.		✓	
[17.9] Obstruction of the Operator in respect the Operator Maintenance Plan and Maintenance Services .		✓	
[17.9] Obstruction by the Operator of the Infraco in respect of the Maintenance Services.	✓		
[17.10] Failure to observe the Operator's Representative's instructions.		✓	
[17.11-13] Failure to notify and co-operate with tie and the Operator and minimise the adverse consequences of Operator Maintenance, Maintenance Services and any planned or unplanned works or activities, including support in providing alternative transport and notifying passengers.		✓	
[17.12/13] Failure to notify passengers of disruption.	✓		
[17.14-17.17] Failure to comment, respond with set timescales,		✓	

Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
provide a report on and carry out modifications as a result of a DPOFA Change.			
[17.14 - 17.17] Variation to DPOFA which adversely affects Infraco's performance.	✓		
[17.18.1] Failure to provide a representative for the Project Safety Certification Committee.		✓	
[17.18.2.1/51.2] Failure to liaise with the Independent Competent Person, HMRI and the Emergency Services.		✓	
[17.18.2.2] Failure to develop and implement the Infraco Safety Management System.		✓	
[17.19] Failure to give access to the Infraco Safety Management System.		✓	
[17.20/17.21] Failure to complete safety and service readiness verification each morning, to certify this to tie and the Operator and to rectify where the system is not ready.		✓	
[17.22] Failure to liaise effectively with the Operator in the co-ordination of health and safety issues at the Depot.		✓	
[17.23] Failure to give the Operator and tie a minimum of one month's notice of any planned lifecycle maintenance forming part of the Maintenance Services to be carried out on any part of the ETN and to give subsequent notices.		✓	
[17.24] Failure to provide tie and the Operator with a combined maintenance plan not less than 6 months prior to the Planned Service Commencement Date, subject to supply to the Infraco of the Operator Maintenance Plan 12 months prior to the Planned Service Commencement Date.			✓
[17.25-17.27] Failure to provide technical advice and information to the Operator during normal working hours; failure to provide reasonable works/site access to Operator and tie ; interference with Operator mobilisation.		✓	
[17.27/17.28] Interference with Infraco while on Site; failure to comply with safety procedures on site; damage to the Infraco Works caused by the Operator or tie (unless fair wear and tear or due to operations in accordance with the Operations and Maintenance Manual).	✓		
[17.29] Failure to work closely and effectively with the Operator to complete the System Acceptance Tests and related obligations on testing and commissioning.		✓	
[17.31] Failure of the Infraco to work collaboratively with the Operator and failure of the Operator to work collaboratively with the Infraco to: <ul style="list-style-type: none"> • [17.31.1] maximise productivity during the Infraco Works and minimise disruption for the public and third parties; • [17.31.2] ensure the delivery of complete system integration; • [17.3.3] satisfy levels of technical systems availability; • [17.31.4] minimise and give the best advance notice of interruption to Transport Services; • [17.31.5] not hinder proper performance of the Project 	✓ ✓ ✓ ✓	✓ ✓ ✓ ✓	

Risk : Operator Interface	Allocation		
	Public Sector	Private Sector	Shared
Development Services, Project Operations and obligations under the Infraco Contract; <ul style="list-style-type: none"> [17.31.6] support adherence to timetables and the Programme; [17.31.7] report promptly any proposed change permitted under the DPOFA or the Infraco Contract and related mitigation; [17.31.8] use reasonable endeavours to minimise likelihood of interface disputes. 	✓	✓	
[17.32 and 17.34] Claims against tie by the Operator pursuant to DPOFA due to Infraco breach, save to the extent contributed to by tie or the Operator.		✓	
[17.33] Liaison between the Operator and Infraco.	✓	✓	

Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[18.1/18.18/18.20/18.21/18.22] Failure to provide appropriate licence and the necessary Land Consents to enter and remain upon the Permanent Land or withdrawal, denial, refusal or delay of granting Infraco access that is undisputed by tie .	✓		
[18.2/18.19] Encroachment, design or construction of ETN on any land outside of the Permanent Land and Temporary Sites without the consent of tie .		✓	
[18.3/18.6/18.17] Breach of a Land Consent due to breach of the agreement or wilful act or omission or the use of Temporary Sites outside that specified in the Acts.		✓	
[18.4] Failure to give tie not less than 40 days' notice where access is required to any Temporary Site for the purposes of carrying out the Infraco Works.		✓	
[18.5] Failure to provide access to the Temporary Sites following 40 days' notice having been given by the Infraco.	✓		
[18.7/18.8] Failure to minimise period of possession of Temporary Site, or failure to quit occupation of such Temporary Site after 28 days (3 months where a Site Office has been established) following the completion of the Infraco Works to such Temporary Site.		✓	
[18.9] Failure to give notice of the vacation of a Temporary Site.		✓	
[18.10] Failure to remove all temporary works from a Temporary Site and restore the land to the reasonable satisfaction of the land owner.		✓	
[18.10.1] Demolition of a building or any part thereof without the consent of tie .		✓	
[18.10.2] Failure to provide tie with sufficient evidence (including a detailed record of the condition of the land both before and after the occupation of the Temporary Site) to show that restoration obligations have been complied with.		✓	

Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[18.11] Compliance with the obligations that have been flowed down into the Infraco Contract from the Third Party Agreements when in occupation of the Permanent Land or any Temporary Sites.		✓	
[18.12] Failure to provide notice of temporary possession for maintenance purposes, excluding where any Building Fixing Agreement contains a right for the Infraco to enter onto any land.		✓	
[18.13] Failure to give possession of land for maintenance purposes under section 27(1) of the Tram Acts.	✓		
[18.14.1] Breach of requirement to be in possession of land less than 20m away from Infraco Works.		✓	
[18.14.2] Possession of land which is not reasonably required for or in connection with the Maintenance Services.		✓	
[18.14.3] Breach of requirement to avoid possession of houses or gardens.		✓	
[18.14.3] Breach of requirement to avoid possession of occupied buildings.		✓	
[18.15/18.21] Provision of additional access, land, rights, facilities and/or Land Consents which are required by the Infraco outside the Permanent and Temporary Land.	✓	✓	
[18.16] Failure to use reasonable endeavours to provide assistance to tie in the provision and amendment of Land Consents.		✓	
[18.17A - 18.17C] Breach of obligations flowed down to the Infraco Contract from the Third Party Agreements or putting tie or CEC in breach of such agreements.		✓	
[18.17A - 18.17C] Taking steps to ensure tie or CEC is not in breach of obligations which have not been flowed down to the Infraco Contract from the Third Party Agreements disclosed to the Infraco - subject to test of reasonably foreseeability by an experienced contractor executing works of a similar nature in a similar environment.	✓	✓	
[19.1] NOTE: CONSENTS CLAUSE 19 STILL UNDER DISCUSSION Failure to obtain and maintain all TTROs TROs and tie Consents	✓		
[19.2] Failure to provide required information to enable tie to obtain a TTRO and all other reasonable assistance and support to tie in obtaining the TTROs, TROs and tie Consents.	✓		
[19.3] Failure to obtain and maintain all Design Stage Consents, Construction and Maintenance Stage Consents and TTROs required after Service Commencement.		✓	
[19.4] Failure to provide reasonable assistance and support to Infraco in obtaining and maintaining the consents for which it is responsible.	✓		
[19.5/19.6] Failure of the Infraco to obtain Design Stage Consent in respect of a design for which SDS is responsible provided that the Infraco has: <ul style="list-style-type: none"> the Infraco has informed tie of the reasons given by the Approval Body; 	✓		

Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> the Infraco has managed the SDS Provider; such failure is not as a result of reprogramming the Infraco Works or reprioritising the design or late submissions; the Infraco has mitigated the impact of such failure and afforded tie the opportunity to resolve matters with the Approval Body; such failure is not as a result of SDS failure to perform in terms of quality 			
[19.7] Failure of the Infraco to obtain Design Stage Consent in respect of a design for which SDS is responsible where the Approval Body has required an unanticipated change to design or has not delivered the consent according to the Consents Programme.	✓		
[19.9] Responsibility for obtaining, maintaining or renewing Additional Consents that are Design Stage Consents or Construction and Maintenance Stage Consents.		✓	
[19.9] Responsibility for obtaining, maintaining or renewing Additional Consents that are tie Consents or are not Design Stage Consents or Construction and Maintenance Stage Consents.	✓		
[19.10] Responsibility for obtaining Network Rail Possessions.	✓		
[19.10] Provision to tie of technical and design documentation as necessary to obtain the Network Rail Possessions.		✓	
[19.10] Cost of obtaining Network Rail Possessions save where due to the Infraco's default or delay.	✓		
[19.10] Cancellation or alteration of possession dates, timings or durations.	✓		
[19.11] Failure to update the Consents Programme by each Reporting Period End Date and showing any Additional Consents to be obtained.		✓	
[19.12] Failure to notify Approval Bodies when required on Site and co-ordination of their works with the Infraco Works.		✓	
[19.13] Failure to provide relevant documentation to tie where tie's authorisation or completion of such documentation is required by Law.		✓	
[19.14] Payment of fees to obtain any Consents, unless otherwise stipulated (e.g. Network Rail Possessions).		✓	
[19.15] Failure to use reasonable endeavours to obtain written consent of adjoining or neighbouring landowners with regard to interference with their rights.		✓	
[19.16] Approval of change to Consents Programme where Infraco demonstrates to tie that this is to prevent or mitigate a tie Change, Relief Event, Compensation Event or a Notified Departure.	✓		
[19.17] Refusal or unreasonable delay in granting Construction and Maintenance Stage Consent, where Infraco has used reasonable endeavours, acted in accordance with Good Industry Practice and provided all necessary information.	✓		
[20.1] Failure to submit the Proposals to tie at least 6 months prior to the date on which the Infraco proposes to install, maintain, modify or		✓	

Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
replace any relevant supporting infrastructure and to obtain tie's consent to the Proposals			
[20. 2 and 20.4] Failure to submit the necessary applications and obtain necessary Consents from the relevant Planning Authority or for temporary poles as an alternative (tie to take planning permission risk is under discussion).		✓	
[20.3] Failure to submit revised proposals where tie consent is withheld.		✓	
[20.5] Where a building fixing agreement is to be used, securing the consent of the Heritable Proprietor and any other relevant party to allow the Infraco to carry out a survey and securing the agreement of the Heritable Proprietor to allow the setting of such building fixings (both at Infraco cost)	✓		
[20.5] Failure to provide tie with the information it requires and to carry out the relevant survey.		✓	
[20.7] Where necessary due to the Heritable Proprietor withholding its consent to building fixings, the responsibility for and cost of the procedure of application to the Sheriff Court pursuant to the Acts or submittal of alternative plans.	✓		
[20.8] Failure to use all reasonable endeavours to assist tie in the procedure for application to the Sheriff Court pursuant to the Acts.		✓	
[20.9] Rejection of application by Sheriff Court or anticipated rejection, cost of submission by the Infraco of revised proposals.	✓		
[20.10] Cost of removal of a building fixing and installation of OLE pole	✓		
[20.11] Selection of method for supporting OLE where building cannot support the loadings of a building fixing		✓	
[21.4] Failure to obtain any street works licence, road opening permit and any other consent, licence or permission (other than any Land Consents) that may be required for the Infraco Works.		✓	
[21.5] Failure to give notice to a relevant authority of its proposal to commence any work and failure to provide assistance to tie to recover contributions from the utilities.		✓	
[21.6] Third Party Works being carried out by a utility, roads authority or an authorised third party.	✓		
[22.1] Adverse physical conditions and artificial obstructions, subject to information being provided.		✓	
[22.2/22.5] Discovery of unidentified utility apparatus, unexploded ordnance, contaminated land or adverse physical or ground conditions which was not listed in the Ground Condition or Utility Information or which could not have reasonably been foreseen from the use of such information.	✓		
[23] Failure to provide tie and tie's Representative and any person authorised by tie or tie's Representative with access upon reasonable prior notice to any site, workshop or facility etc during normal working hours.		✓	
[23] Failure to comply with rules and regulations when on such sites.	✓		

Risk : Land Issues and Consents	Allocation		
	Public Sector	Private Sector	Shared
[24.1/24.2] Failure to execute the Depot Licence and comply with the terms thereof.		✓	
[24.4] Condition or fitness for purpose of the Depot.		✓	
[24.5] Liability for death, injury, damage to property or any other liability resulting from use of the Depot.		✓	
[24.6] Disruption of the Infraco's performance by tie or tie Parties accessing the Depot.	✓		

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

Risk : Performance of the Works	Allocation		
	Public Sector	Private Sector	Shared
[25.1] Failure to observe the reasonable instructions of tie's Representative.		✓	
[25.1 and 25.7] Failure to monitor the Infraco Works and failure to inform Infraco of the identity of tie's Representative.	✓		
[26] Acts or omissions of the Infraco's Representative.		✓	
[26.1] Failure to provide sufficient superintendence to the Infraco Works.		✓	
[26.2/26.5/26.7] Failure to obtain/retain tie's approval of the Infraco's Representative or his deputy.		✓	
[26.3] Supervision, management and coordination of the Infraco Works to ensure completion of the Infraco Works.		✓	
[26.8] Replacement of the Infraco's Representative.		✓	
[26.9/26.10] Failure to provide sufficient staff and involve the Key Personnel in the Infraco Works.		✓	
[26.12] Failure to ensure that there are no changes to the Key Personnel without tie's prior written consent and that any replacement persons shall be of at least equivalent status an ability to the person whom they replace.		✓	
[26.13] Failure to use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Infraco Works and to carefully select Key Personnel having careful regard to their existing work load and other planned commitments.		✓	
[26.14] Failure to ensure that Key Personnel have the requisite level of skill, experience and authority and receive the necessary amount of training and supervision.		✓	
[26.16] Contracting of or retention of as an adviser or consultant any person currently or previously employed or engaged in the previous 3 months by tie without the prior written approval by tie .		✓	
[26.17] Failure of Key Personnel and other staff to comply with regulatory requirements and tie's drug and alcohol policy.		✓	
[26.18] Allowing the consumption of, or work of under, the influence of alcohol or drugs or the giving, selling or bartering of the same.		✓	
[27.1] Failure to employ careful, skilled and experienced staff or site supervisors with CSCS (or equivalent) certification.		✓	
[27.2] Misconduct, incompetence, negligence or non-compliance with safety precautions of any person employed on the Infraco Works.		✓	

Risk : Construction	Allocation		
	Public Sector	Private Sector	Shared
[29.1 and 29.2] Errors in the position, levels, dimensions or alignment of any setting out of the Infraco Works during progress of Infraco Works until the issue of a Patent Defects Rectification Certificate..		✓	
[29.3] Protection and preservation of items required for setting out.		✓	
[30.1] Failure to have full regard to safety of all persons entitled to be on Site and to keep the Site in an orderly state to avoid danger to such persons.		✓	
[30.2] Failure to provide required lights, guards, fencing etc.		✓	
[30.3] Failure to comply and use reasonable endeavours to ensure others comply with health and safety legislation and requirements.		✓	
[31.1 and 31.2] Failure to take full responsibility for the care of the Infraco Works from the Commencement Date until, in relation to each Section, the date of issue of a Certificate of Sectional Completion in relation to that Section and, in relation to Trams and Tram Related Equipment, the date of issue of a Certificate of Tram Commissioning including rectification for loss or damage.		✓	
[32.1] Failure to comply with the Code of Construction Practice and Code of Maintenance Practice regarding maintenance of access to properties, bus stops and bus services and the closure of roads.		✓	
[32.2] Failure to minimise nuisance, inconvenience or interference to the business or operations of the owners, tenants of properties on or in the locality of the Site, bus operators and to the public generally and failure to comply with the Code of Construction Practice and Code of Maintenance Practice in this regard.		✓	
[33.1] Failure to use reasonable means to prevent roads or bridges being subjected to extraordinary traffic by the Infraco.		✓	
[33.1] Failure to select routes and use vehicles to as far as possible avoid unnecessary damage to roads and bridges.		✓	
[33.2] Strengthening bridges or altering or improving any highway connecting with the Site to facilitate installation of the Trams, the Infraco's Equipment or Temporary Works.		✓	
[33.2 and 33.3] Claims for damage to highways or bridges caused by the installation of Trams, Infraco's Equipment or Temporary Works.		✓	
[34.1] Failure to construct and complete the Infraco Works in strict accordance with the Agreement and in strict compliance with tie's instructions.		✓	
[34.2] Failure of the materials, Infraco's Equipment, labour, mode and manner of construction being in accordance with the Infraco Contract.		✓	
[34.3] Time and cost (Compensation Event) if tie's instructions result in any delay or disruption or cost to the Infraco unless they result from the Infraco's default.	✓		
[39] Discovery of Fossils and Antiquities (including historical human remains) on Site.	✓		

Risk: Maintenance	Allocation		
	Public Sector	Private Sector	Shared
<p>Failure to carry out all maintenance, repair, renewals and remedial works to the ETN as is necessary to:</p> <ul style="list-style-type: none"> • [52.1.1] maintain the ETN in accordance with the Maintenance Programme and the Maintenance Plan; • [52.1.2] ensure that the requirements of the Maintenance Specifications are met at all times; • [52.1.3] comply with the Operator Procedures; • [52.1.4] ensure that tie is informed of any adverse impact of design, redesign or modification to the Infraco Works; • [52.1.5] ensure that no maintenance or repair work shall prejudice to the Care for Safety; • [52.1.6] not prejudice the health or safety of or unreasonably interfere with the duties of the Operator and third parties or expose tie liability under health and safety legislation; • [52.1.7] maximise the extent to which the ETN is available and to minimise interruption to availability; • [52.1.8] sustain the functionality of the component parts of the ETN for not less than the design life; • [52.1.9] hand back the ETN in a condition consistent with the Infraco having complied with Clause 52 (<i>Maintenance</i>) provided save for fair wear and tear or the expiry of working life. 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ ✓ 	
[52.2/52.3] Failure to work with Operator in respect of daily handover and handback.		✓	
[52.5] Failure to carry out Mobilisation Services on or before the appropriate Mobilisation Milestone Dates.		✓	
[52.6] Failure to carry out the Maintenance Services safely and efficiently and free of any reasonably avoidable risk of pollution, nuisance, interference or hazard.		✓	
[52.7] Failure to employ and train all staff necessary to perform the Maintenance Services in accordance with the Infraco Contract.		✓	
[52.8] Failure to provide and employ all staff necessary to perform the Mobilisation Services in accordance with the Infraco Contract.		✓	
[52.9] Failure to supply only new materials and goods (save where they have been repaired in accordance with Good Industry Practice) of a satisfactory quality.		✓	
[52.10-52.11] The provision of all Spare Parts and Special Tools required for the Maintenance Services (including the provision of valid calibration certificates) and which meet the technical and safety requirements of the Maintenance Specification. Failure to notify tie of breach of warranty or supply of defective s pares by Tram Supplier or Tram Maintainer.		✓	
[52.12/52.14] Failure to manage and maintain adequate stocks for the Minimum Spare Parts Pool at the Depot, manage reorders and lead times and review of the level of Minimum Spare Parts Pool.		✓	

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

Risk : Quality, Testing and Examination	Allocation		
	Public Sector	Private Sector	Shared
[35.1] Failure of the materials and workmanship to be as described in the Infraco Contract. Testing and examination of the quality, weight or quantity of any materials used before use in the Infraco Works.		✓	
[35.2] Costs of and supply of samples.		✓	
[35.3/41.2/44.2/47.2] Costs of any specified tests.		✓	
[35.3/35.4] Costs of tests not identified in the Infraco Contract but requested by tie , save where required because of Infraco's breach.	✓		
[36.1] Failure to give 48 hours notice to allow examination of work prior to covering up.		✓	
[36.2] Cost of uncovering where Infraco Works are found to be in accordance with Agreement.	✓		
[36.2] Cost of uncovering where Infraco Works are found not to be in accordance with Agreement.		✓	
[37.1] Removal and replacement of unsatisfactory workmanship or materials.		✓	
[37.5] Costs of opening up and testing for unsatisfactory work and materials following repeated non-compliance.		✓	
[37.5] Relief Event where opening up shows workmanship to be in accordance with the Infraco Contract.	✓		
[38.3] Urgent repairs carried out by tie which the Infraco was liable to carry out at its own expense under the Agreement and which in the opinion of tie's Representative, acting reasonably, is necessary by reason of emergency or an immediate threat to health and safety.		✓	
[38.4] Cost of urgent repairs carried out by the Infraco (except to the extent such work results from Infraco's default).	✓		
[40] Rectification of errors or omissions in the Infraco Works.		✓	
[40] Rectification of errors or omissions in the Infraco Works where caused by a Notified Departure, Compensation Event or Relief Event.	✓		
[41 and 42] Completion and Certification of Milestones.	✓	✓	
[43] Appointment of Tram Inspector and compliance with obligations in the Tram Inspector Agreement and cooperation regarding related matters.	✓	✓	
[43.10] Costs of appointment and services of the Tram Inspector.	✓		
[44.1/45.1/47.1] Failure to inspect the Infraco works on the dates specified.	✓		
[44.2/45.2/47.2] Costs of tests including necessary repetitions.		✓	
[44.3/45.3/46.4/47.3] Failure to issue certificates on completion of works.	✓		
[44/45/46/47] Failure to complete works in accordance with the Infraco Contract.		✓	
[46] Carrying out and completion of Snagging List works and rectification of Patent Defects.		✓	

Risk : Quality, Testing and Examination	Allocation		
	Public Sector	Private Sector	Shared
[47.2/47.4] Failure to complete T5 and to satisfy tie that T5 is complete and that a Reliability Certificate should be issued.		✓	
[48] Tests, surveys, trials or searches at tie's request where the defect or fault is one for which the Infraco is not liable under the Agreement.	✓		
[48] Tests, surveys, trials or searches at tie's request where the defect or fault is one for which the Infraco is liable under the Agreement.		✓	
[55.2] Failure to remedy defective maintenance performance.		✓	
[56.1] Failure to comply with Schedule 6 Maintenance Payment Regime.		✓	
[56.2] Failure to provide required personnel for Maintenance Services performance meetings.		✓	
[56.3-56.5] Failure to submit Service Quality Reports, Annual Service Reports and Self-Monitoring Plans (and failure to comply with such plan) at the required times.		✓	
[56.6] Failure to inform tie where the Maintenance Services have not been delivered and failure to assist tie in inspecting and observing the monitoring procedures.		✓	
[56.8] Costs of and conducting of increased monitoring as a result of Underperformance Warning Notices being issued.		✓	
[105.1.2] Failure to operate a quality management system in accordance with BS EN ISO 9001:2000.		✓	

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

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

Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[Definition of Compensation Event] Pricing Assumption does not hold good	✓		
[Definition of Compensation Event] Delay in issuing tie Change order following a Notified Departure	✓		
[Definition of Compensation Event] tie failure to give possession or access including refusal of third party to permit Infraco to exercise occupation rights.	✓		
[Definition of Compensation Event] Occurrence of any delay caused by CEC stopping up streets.	✓		
[Definition of Compensation Event] Execution of Utilities Works or MUDFA works.	✓		
[Definition of Compensation Event] Breach by tie or any tie Party which adversely affects the performance of the Infraco Works.	✓		
[Definition of Compensation Event] Discovery of unexploded ordnance, unidentified utility apparatus or contaminated land.	✓		
[Definition of Compensation Event] Instructions from tie which result in disruption or cost to the Infraco.	✓		
[Definition of Compensation Event] Failure by tie to obtain any Land Consent, Building Fixing Agreement, Consent, land agreement or TRO.	✓		
[Definition of Compensation Event] Protestor Action which lasts for more than 14 days or more than one day in respect of protestor action affecting the Tram Supplier's performance.	✓		
[Definition of Compensation Event] Vandalism impacting ETN.	✓		
[Definition of Compensation Event] Operator Events.	✓		

Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[Definition of Compensation Event] Any breach by Network Rail of the Asset Protection Agreement or the Network Rail Agreement.	✓		
[Definition of Compensation Event] Malfunction or non-interoperability of free issue material.	✓		
[Definition of Compensation Event] A breach by the Tram Inspector of the Tram Inspector Agreement.	✓		
[Definition of Compensation Event] Suspension of the Works where not due to Infraco breach.	✓		
[Definition of Compensation Event] Carrying out of rescheduled tests or inspections where tie failed to attend the scheduled test.	✓		
[Definition of Compensation Event] Disruption to the Infraco Works caused by tie exercising its right of access at the Depot.	✓		
[Definition of Compensation Event] Compensation Event under the Tram Supply Agreement resulting from a Relief Event which causes a 3 month delay to the delivery of the Depot.	✓		
[Definition of Compensation Event] Failure of the SDS Provider to achieve Issue for Construction of any Design Package by the due date (less LADs recoverable from the SDS Provider).	✓		
[Definition of Compensation Event] Operator actions under Clause 17.34	✓		
[Definition of Compensation Event] Delay on Consent for Building Fixing Agreement	✓		
[Definition of Relief Event] Occurrence of any referable delay caused by orders or directions from tie's Representative in respect of the removal of unsatisfactory work or materials	✓		
[49.1/49.3] Failure to remove materials and equipment at the correct time.		✓	
[Definition of Relief Event] Protestor Action against tie that last for less than 14 days or against any unconnected third party.	✓		
[Definition of Relief Event] Acts of terrorism.	✓		
[Definition of Relief Event] UK strike, lockout, go-slow or industrial dispute affecting Infraco or Tramco workforce.	✓		
[Definition of Relief Event] Force Majeure Event.	✓		
[Definition of Relief Event] Fire, explosion, lightning, tempest, flood (other than flood caused by bursting or overflowing of apparatus or pipes), storm, ionising radiation, riot, civil commotion or earthquakes.	✓		
[Definition of Relief Event] Failure by any Utility to carry out works or provide services which they would ordinarily provide.	✓		
[Definition of Relief Event] Any accidental loss of or damage to a material part of the Infraco Works.	✓		
[Definition of Relief Event] Power failure or bursting or overflowing of apparatus or pipes save where caused by the Infraco.	✓		
[64.2/65.2] Failure to notify tie within 20 Business Days of awareness of relief event/compensation event and to notify in the prescribed manner.		✓	

Risk : Relief Events (time) and Compensation Events (time and/or costs)	Allocation		
	Public Sector	Private Sector	Shared
[64.8/65.9] Failure to identify long lead time works or enabling works; to manage interface with CEC, any Approval Body or third party; or to identify instructions required from tie .		✓	
[64.9/65.10] Any other cause of delay not being a Relief Event or Compensation Event or caused by Infraco breach.		✓	
[80.14] Delay/costs due to a tie Change (save where the Infraco could have prevented the need for the tie change).	✓		

Risk : Payment and Measurement	Allocation		
	Public Sector	Private Sector	Shared
[41.1] Failure to attend testing relevant to Milestone achievement.	✓		
[41.3] Failure to notify tie in relation to the achievement of a milestone (including a critical milestone).		✓	
[66] Payment of Contract Price.	✓		
[66.6] Failure to submit all payment applications within 3 months of final account		✓	
[67/68] Submission of applications for payment within required timescales and provision of required information.		✓	
[67/68] Payment of Infraco applications for payment and certification of sums approved.	✓		
[67/68] Failure to adhere to requirement to procure collateral warranties prior to payment.		✓	
[69.1] Interest on Late Payment at Base Rate + 2%.	✓		
[69.2] Set-off of amounts due to tie from the Infraco.		✓	
[69.3] Failure to issue a notice of withholding within the prescribed time period.	✓		
[70.1] Payment of tax on any taxable supplies to tie .		✓	
[70.2] Payment of VAT properly chargeable by the Infraco on the supply to tie of any goods/services under the Infraco Contract.	✓		
[70.3] Provision of support in relation to VAT disputes.	✓	✓	
[70.5] Reimbursement of VAT element of reimbursement or indemnification.	✓	✓	

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

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

Risk : Indemnities, liability and sole remedy	Allocation		
	Public Sector	Private Sector	Shared
[49.2] Loss or damage to Infraco's Equipment, Temporary Works, goods or materials, Trams, engineers works vehicles, Spare Parts, Special Tools, save for death, injury or damage to property caused by tie or CEC.		✓	
[77.1] The Infraco to indemnify the Indemnified Parties from and against any and all claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses incident thereto (including without limitation any legal costs of defence) as a result of the Infraco's negligence or breach of the Agreement.		✓	
[77.2] Death, injury or damage to property caused by tie or CEC.	✓		
[77.4] Failure to indemnify Infraco against uninsured claims arising out of Infraco Works as unavoidable consequence of compliant execution	✓		
[77.5] Failure to obtain approval from Network Rail		✓	
[77.10] Indirect Losses.	✓	✓	
[77.14] Payment of tonnage, royalties rent for stone, gravel, clay or other necessary materials.		✓	
[77.13] Failure to take any measure to ensure tie is not committing an offence where the Infraco has caused tie to commit an offence.		✓	

Risk : Indemnities, liability and sole remedy	Allocation		
	Public Sector	Private Sector	Shared
[77.15] Liability for Latent Defects up to 12 years from issue of the Reliability Certificate.		✓	

Risk : Changes	Allocation		
	Public Sector	Private Sector	Shared
[79.2] Failure to maintain a change control register and provide a copy (and updates) to tie .		✓	
[80] tie Changes, Mandatory tie Changes and Notified Departures	✓		
[80] Failure to comply with Estimate requirements and time limits		✓	
[80.7] Failure to include attempt to minimise costs, need for, and impact of the tie Change		✓	
[80.8] Failure to demonstrate that it is appropriate to subcontract for the tie Change and obtain best value for money		✓	
[80.8] Failure to agree the Estimate			✓
[80.12] Refusal to implement tie change on grounds as set out.	✓		
[80.13] Withdrawal of tie Notice of Change	✓		
[80.14] Deemed withdrawal of a tie Change due to failure to issue tie Change Order within 28 days of agreement on Estimate.	✓		
[80.19] EoT or Costs if Infraco could have foreseen the need for or materially reduced the scope of the tie charge		✓	
[80.20/80.21] Failure by the Infraco to notify tie within set periods of matters which may constitute a tie Change.		✓	
[80.22] Requirement of Infraco to comply with Third Party Agreements outwith as set out in the Infraco Contract.	✓		
[81] Infraco Changes.		✓	
[81.1] Failure to notify tie of matters which may constitute an Infraco Change.		✓	
[81.2.1] Reduction in Contract Price if Infraco Change results in lower costs.		✓	
[81.2.2] Increase in costs to Infraco if such increased costs result from an Infraco Change.		✓	
[81.3] Proposal of a change which might result in a saving of more than £20,000.		✓	
[81.4/82.6/83.5] Failure to update programme, pricing schedules, maintenance services performance plan and other Deliverables as required.		✓	
[82.3] Failure to take reasonable steps to minimise the duration of any Small Works.		✓	
[82.4] Failure to carry out and complete any Small Works in accordance with Small Works Cost Notice.		✓	
[82.5] Payment of Small Works.	✓		

Risk : Changes	Allocation		
	Public Sector	Private Sector	Shared
[83.2] Failure to take reasonable steps to minimise the duration of any Accommodation Works.		✓	
[83.3] Failure to carry out and complete any Accommodation Works in accordance with Accommodation Works Cost Notice.		✓	
[83.5] Payment of Accommodation Works.	✓		
[84] Time and cost implications of Qualifying Changes in Law (in excess of the thresholds).	✓		
[84.1/84.2] Agreement and discussion on effects and mitigation measures relating to Qualifying Changes in Law.	✓	✓	
[84.2] Failure to use all reasonable endeavours to minimise increase in costs, to mitigate effects and to implement changes in the most cost effective manner.		✓	
[84.3] Extension of time and costs resulting from any Qualifying Change in Law.	✓		
[84.3] Failure to implement the change in all circumstances (except to the extent that such change is not necessary to implement the Qualifying Change in Law)		✓	
[84.4.1] Payment in respect of Qualifying Changes in Law which exceed in aggregate £150,000.	✓		
[84.4.2] Where the limit of £150,000 in aggregate has been exceeded, payment in respect of SDS Qualifying Changes in Law which exceed in aggregate £15,000 in respect of each and every event.	✓		
[84.4.3], Where the limit of £150,000 in aggregate has been exceeded, payment in respect of Tram Supply Qualifying Changes in Law which exceed in aggregate £30,000 in respect of each and every event.	✓		
[84.4.4] Payment for 5 years following Service Commencement in respect of Tram Maintenance Qualifying Changes which exceed in aggregate £15,000 in respect of each and every event up to an aggregate of £150,000 and thereafter to be treated as a Mandatory tie Change..	✓		
[84.4] Payments in respect of Qualifying Changes in Law within the thresholds.		✓	
[84.5/84.10] General Change In Law, subject to Infraco's entitlement to benchmark after 3 years following Service Commencement and thereafter once in any 3 year period.		✓	
[85.1] The cost of any Phase 1b option.	✓		
[86.2] Failure to provide the services as requested by tie in relation to any Network Expansion.		✓	
[86.2] The cost of Infraco providing services in relation to any Network Expansions.	✓		

Risk : Termination	Allocation		
	Public Sector	Private Sector	Shared
[87] Suspension of Work (unless necessary by reason of default on the part of Infraco and for health and safety reasons) for more than 6 months.	✓		
[88] Termination on tie Default: agreement terminates 30 days after tie receives Infraco notice specifying default. tie has 30 days to rectify, if capable of rectification.	✓		
<p>[tie Default definition]</p> <ul style="list-style-type: none"> • Failure to pay an amount in excess of £250,000 for more than 30 days following the final date for payment; • breach of tie's material obligations frustrating or making it impossible for Infraco to perform for continuous period of 45 Business Days; • tie Insolvency Event; • tie breach of assignation provisions; and • Change in Law make Infraco Works impossible or illegal. 	✓		
[88.5] Failure to remove Infraco Equipment following termination.		✓	
[88.8] tie Default termination payments: all works carried out as valued; prelims; supplies/materials committed under contract; demobilisation costs; subcontractor breakage costs; loss of profit; in respect of termination after Service Commencement an amount representing one month's maintenance payment.	✓		
[88.9] Suspension of works for non-payment by tie or CEC in accordance with the CEC Guarantee.	✓		
[89] Voluntary Termination by tie following three years after the issue of the Certificate of Service Commencement and equivalent payment provisions to termination for tie Default.	✓	✓	
[90] Termination due to Infraco default unless a rectification plan is agreed and adhered to in respect of rectifiable defaults.		✓	
<p>[Infraco default definition]</p> <ul style="list-style-type: none"> • Infraco Insolvency Event (rectifiable); • Infraco breach of an obligation under the Infraco Contract which materially and adversely affects the Infraco Works (rectifiable); • Infraco does not confirm its acceptance of an increase in LADs cap; • Infraco's unremedied failure to take out and maintain the Required Insurances; • failure to achieve Sectional Completion Date or the Service Commencement Date on or before the date falling 12 months after the Planned Service Commencement Date or Planned Sectional Completion Date except as a result of a Compensation Event, Relief Event, Force Majeure Event, tie Change, Accommodation Works Change, Change in Law or Suspension; 		<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓ 	

Risk : Termination	Allocation		
	Public Sector	Private Sector	Shared
<ul style="list-style-type: none"> change in legal status or control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works (rectifiable); Infraco's failure to commence Works within 90 days of Commencement Date; Infraco's suspension of works without cause for 15 Business Days after receipt of a written notice to proceed; the issue of 4 or more Underperformance Warning Notices in any 12 month period; and 		✓	
[91] Termination for Force Majeure (payments to be made as per tie Default).	✓	✓	
[92] Termination if Infraco or Sub-Contractor commits a Prohibited Act (payments to mirror Infraco Default payments).		✓	
[93] Infraco's persistent breach of its obligations, save for termination of sub-contractors and wipe clean.		✓	

Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[50.3] Compliance with CDM responsibilities.			✓
[51.1] Failure to report accidents to tie and HSE or ORR as appropriate.		✓	
[51.2] Failure to liaise with the Emergency Services.		✓	
[58] TUPE responsibilities.	✓	✓	
[58.9] Costs of compliance with TUPE provisions.	✓		
[59.5] Reasonable and demonstrable costs arising from a step-in for Health and Safety and Environmental reason or from Infraco taking actions as required under the Step-In provisions.		✓	
[71.2] Employment related and land fill tax fluctuations where tie is informed of such increase within 3 months.	✓		
[71.2] Tax fluctuations where tie is not informed of such increase within 3 months.		✓	
[72] Failure to provide and to procure that sub-contractors provide details of labour as requested by tie .		✓	
[73] Failure to secure continuous improvement in the Infraco Works and to provide reasonable assistance to tie in respect of best value performance and improvement including the preparation of an Annual Service Report.		✓	
[94.4] Failure to return the Deliverables and any information following termination or expiry.		✓	

Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[95] Failure to provide the Handback Package, to secure continuity in services and assist in the handover following termination.		✓	
[96] Failure to carry out maintenance to required standard		✓	
[96.4.3] Failure to provide defects rectification bond		✓	
[98] Unauthorised Assignment.	✓	✓	
[100.1] Creation of Security Interest over the ETN, the Assets or the Infraco Contract.		✓	
[100.2] Disposal of any right in any Asset if doing so has a material adverse effect on the ETN or the rights of CEC in such Assets.		✓	
[101] Unauthorised disclosure of and inadequate safeguarding of confidential information.	✓	✓	
[101.7] Breach of terms of ministerial guidance in relation to FOISA.	✓		
[101.7] Failure to provide to tie assistance in compliance with FOISA obligations.		✓	
[102.2] Failure to properly assign IPR or grant appropriate licences to tie .		✓	
[102.9] Failure to use reasonable endeavours to procure licences of Third Party Software and commercially available software for tie .		✓	
[102.10] Failure to ensure back up and storage of Deliverables in accordance with Good Industry Practice.		✓	
[102.12] Failure to provide source code, object code and documentation in relation to Third Party Software to tie .		✓	
[102.14] Failure to ensure auditable records and specifications are developed in relation to Infraco Software and that its design and development to industry standard so that a qualified person could verify its performance in relation to equipment and functional requirements.		✓	
[102.15] Failure to provide coding and ancillary programs to generate code in relation to the Infraco Software.		✓	
[102.16] Failure to place and the cost of placing source code of the Infraco Software in escrow.		✓	
[102.17/102.18] Failure to create, maintain, report on, update, hand over and allow access to the Technical Library.		✓	
[103] Breach of data controller obligations and other prescribed obligations in relation to personal data.		✓	
[104.1-104.2] Failure to keep all Deliverables, invoices, timesheets and expense claims in accordance with Good Industry Practice and in good order and to make the same available for inspection.		✓	
[104.3-104.5] Failure to provide further information as requested by tie , to comply with storage, usage or processing requests or to provide required assistance.		✓	
[104.6] Failure to provide information to the Infraco to allow it to perform its obligations under the Infraco Contract.	✓		

Risk : Miscellaneous	Allocation		
	Public Sector	Private Sector	Shared
[105] Failure to operate, audit, review and comply with the HSQE system.		✓	
[105.3] Defect in the Infraco Works caused by non-compliance of a Deliverable with the HSQE System.		✓	
[107] Failure to do any act or execute any document to give effect to the Infraco Contract.	✓	✓	
[110] Acting as tie's agent where not authorised to do so.		✓	
[115] Unlawful discrimination.		✓	
[118] Failure to act reasonably when exercising discretion.		✓	
[119] Failure to mitigate losses.	✓	✓	
[17] Failure to arrange interface with operator.	✓		

Risk : Dispute Resolution	Allocation		
	Public Sector	Private Sector	Shared
Failure to proceed with process after 90 day warning notice			✓

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Content of this section

- Process of drafting, negotiation, review and quality control
- General description of scope, parties and contract structure
- Overview of Infraco contract terms
- SDS Novation Agreement and design delivery and approval process
- Confirmation of BBS acceptance of modelling
- Employer's Requirements and Infraco & Tramco Proposals
- Advance purchase materials
- Infraco payment mechanism
- Infraco performance security arrangements
- Overview of Tramco contract terms
- Tramco payment mechanism
- Tramco performance security arrangements

Process of drafting, negotiation, review and quality control

The structure, membership and competence of the tie / TEL commercial and technical negotiating team has been assessed by tie and has remained largely consistent since the bid evaluation process commenced. Council officers have operated in an integrated manner with the main negotiating team, which has also had extensive support from our external legal advisors (in DLA Piper's case from late September 2007 onwards, following instruction to disengage from the process in May 2007), Transdev and other advisors.

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Appropriate quality control procedures have been applied to finalisation of the Infraco contract suite. In a number of critical areas, senior tie and TEL people have performed a review of terms independent of the main negotiating team, the important elements of which are set out in this report. The TPB, TEL and tie Boards have been regularly kept abreast of progress in all important areas and have confirmed or redirected effort as appropriate. Communications on these key matters with senior Council officers has been conducted both through the TPB and its sub-committees and also through frequent informal contact. Finally, the OGC Gateway 3 Review Team examined key areas of the contract suite before approval in advance of the October 2007 Council meeting.

In broad terms, the principal pillars of the ETN contract suite in terms of scope and risk transfer have not changed materially since the approval of the Final Business Case in October 2007. The process of negotiation and quality control has operated effectively to ensure the final contract terms are robust and that where risk allocation has altered this has been adequately reflected in suitable commercial compromises.

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This report is not a substitute for reading the Contract itself. It is focussed on those provisions in which CEC has expressed particular interest and has directed tie should be included in the report. It should be understood that the ETN Contract Suite has undergone a lengthy and difficult negotiation and close out phase. BBS has on a number of occasions moved from a previous firm position and this has required detailed re-examination and recasting of contractual provisions in order to reinstate acceptability.

General description of scope, parties and contract structure

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The Infraco contract suite comprises the following principal contracts :

- Infraco system design, construction and maintenance contract between tie and BBS;
 - Employer's Requirements and Infraco Proposals;
 - Tramco vehicle supply and maintenance contracts between tie and CAF;
 - Tramco Novation Agreement establishing Infraco – Tramco arrangements;
 - SDS Novation Agreement establishing Infraco – SDS Provider arrangements;
 - Security documentation; and
 - Ancillary agreements and Collateral Warranties
- Pricing and payment arrangements

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Overview of Infraco contract terms

The Infraco Works are to be carried out pursuant to an Infraco Contract between tie Ltd and Bilfinger Berger (UK) Limited and Siemens plc. Bilfinger Berger (UK) Limited and Siemens plc have formed an unincorporated consortium to carry out the Infraco Works and are together called the 'Infraco', each company separately being an Infraco Member. Bilfinger Berger (UK) Limited and Siemens plc have joint and several liability for the performance and discharge of all obligations under the Infraco Contract and the three novated agreements that will be housed within it.

Authority to Transact

The legal authority of the various counterparties to tie and to CEC (under its Guarantee) will be confirmed in the conventional manner:

- each party will produce certified board minutes or other legally competent evidence of the corporate decision to enter into the ETN Contract Suite;
- all signatories will demonstrate legally effective power of attorney from their respective organisations; and
- in relation to foreign companies, an external counsel's opinion covering the legally binding nature of the corporate acts (re Contract execution) carried out in accordance with corporate governance, the signatories' delegated authority and the enforceability of the Contracts against the parties through the courts in their respective home jurisdictions.

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CEC and tie will be required to produce their own legal authority to transact as has been explained and agreed previously with CEC Legal.

The Infraco Contract executed by tie Limited, Bilfinger Berger (UK) Limited and Siemens plc comprises the Core Terms and Conditions and a series of detailed Schedules which contain the price for and the scope of the Infraco Works and amplify the responsibilities and commitments accepted by the Infraco.

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Conditions Precedent

At present, the draft Infraco Contract provides that the delivery of various ancillary agreements (notably the novations and the performance security package) are conditions precedent to Contract effectiveness. As tie's intention is for all documentation to be closed, provided and executed simultaneously, this technical provision may be removed prior to contract award date.

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Warranties

The Infraco members provide key individual warranties regarding the Infraco Proposals meeting the Employer's Requirements and regarding their capacity to enter into the Infraco Agreement.

Duty of Care and General Obligations

Under the Infraco Contract, the Infraco has a duty of care and general obligation to carry out and complete the Infraco Works fully in accordance with the Agreement. Infraco is further obligated to procure that the Infraco Parties (the Infraco members and their agents, advisors, consultants and sub contractors) carry out the Infraco Works in accordance with, inter alia, the Contract, the general Law and stipulated tie and CEC policies to enable the Edinburgh Tram Network to be designed, constructed, installed, integrated, tested, commissioned and thereafter maintained. The scope for which the Infraco has contracted is contained in the Employer's Requirements and the Infraco Proposals. The Infraco is committed to interface with Transdev as the system operator.

Indemnity Provisions

Generally, the Infraco must indemnify tie and CEC from all losses incurred as a result of a breach of the Infraco Contract by the Infraco or negligent or wilful acts of the Infraco. This includes where the breach or negligence causes:

- death or injury;
- damage to property or to the Infraco Works;
- infringement of third party IPR;
- causing tie or CEC to breach any law, consents, disclosed third party agreements or undertakings entered into prior to the date of the Infraco Contract;
- causing tie or CEC to breach the Network Rail Asset Protection Agreement, the DPOFA or the Tram Inspector Agreement.

The Infraco is wholly responsible to tie for any actions or omissions of its employees, agents, advisers and sub-contractors.

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Principal Exclusions are the following:

- any act or omission of tie or CEC is the cause of such death, injury or damage to property;
- proportion of loss caused by tie/CEC;
- indirect losses of tie/CEC by reason of Infraco breach or negligence, but certain indirect losses claimed by a third party are carved out of this prohibition. Infraco would therefore be liable to indemnify tie/CEC against a claim for lost revenue asserted by a business for physical damage caused by Infraco's breach, but not for economic loss, unless **flowing from physical damage or otherwise** insured.
- Insurance deductibles and excesses where the claim has been caused by CEC/tie's contributory fault or because tie has altered OCIP to accept a higher level of excess or deductible.
- any liability incurred by Infraco to a third party where Infraco is performing its obligations in accordance with the Agreement (i.e. claims in nuisance).

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ETN Assets

The Agreement provides for the direct transfer of title to CEC in all materials, goods, and equipment which are intended to be part of the completed Edinburgh Tram Network. Infraco shall procure that all ETN assets are supplied free from security interests and that any goods or materials stored off site are identified as belonging to CEC, wherever practicable.

Price

A contract price has been agreed. The detailed contract price and pricing schedules for carrying out the Infraco Works is contained in Schedules to the Infraco Contract. A substantial portion of the Contract Price is agreed on a lump sum fixed price basis. There are certain work elements that cannot be definitively concluded in price and therefore Provisional Sums are included. A number of core pricing and programming assumptions have been agreed as the basis for the Contract Price. If these do not hold, Infraco is entitled to a price and programme variation known as "Notified Departure".

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Programme

The Agreement provides that Infraco shall progress the Infraco Works to achieve timeous delivery and completion of the Infraco Works (or parts thereof) and in their obligations under the Agreement, all in accordance with an agreed Programme which is bound into the Schedules. This Programme is the product of tie, Infraco and SDS Provider negotiations and is cardinal to the control of Infraco and SDS Provider's performance and their potential entitlements to relief or additional payment. Following contract signature, it is expected that BBS will seek a Notified Departure on Programme due to SDS delay in design production. However, both BBS and SDS have a contractual obligation to mitigate. The exposure has been assessed in detail by tie and confirmed as acceptably within the risk contingency.

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Milestones and Payment schedule

The construction sequence is broken down into construction milestones and critical milestones and Procedures have been agreed for the monitoring of progress toward each milestone based upon milestone schedules. Interim payments will be made to Infraco 4-weekly subject to and in accordance with the completion of stated Milestones. The Agreement obliges Infraco to complete the Infraco Work in sections and failure to complete sections by the sectional completion date will result in Infraco becoming liable to pay liquidated and ascertained damages to tie at amounts stated in the Agreement. If Infraco are delayed by reason of certain prescribed contractual events they may be able to apply for an Extension of Time and/or claim costs.

Novations

The Agreement provides that, as a condition precedent, Infraco shall enter into and execute Novation Agreements to incorporate and bind previous agreements between tie and the design provider (SDS), the Tram supplier (Tramco) and the Tram Maintenance provider (Tramco), into the Infraco Contract. These agreements therefore become the full responsibility of Infraco as an essential component of the carrying out of the Infraco Works. In addition to the Novation Agreements, assignable collateral warranties are to be provided to tie by the design provider (SDS), the Tram supplier (Tramco) and the Tram Maintenance provider (Tramco).

Network Rail Interface

Under the Infraco Contract, Infraco acknowledges that it will require to comply with the Asset Protection Agreement (APA) ~~between tie / CEC and Network Rail~~ in relation to the Edinburgh Tram Network. Infraco are to comply with the APA and undertake not to put tie/CEC in breach of it. The APA has been stepped down into the Infraco Contract so that the Infraco is fully on notice of those obligations which it will perform on behalf of tie/CEC.

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Operator Interface

The Infraco's interface with Transdev is dealt with through Clause 17 of the Agreement. A duty of liaison and cooperation is imposed. Interference with maintenance works by the Operator may entitle an Infraco to claim for a Compensation Event and ~~conversely~~ any adverse affect of unplanned maintenance/defective maintenance would give rise to a right of indemnity for tie against any Transdev claim for relief/cost under the DPOFA. Any change to tram operations which adversely impacts the Infraco maintenance could give rise to a tie Change.

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Safety

Infraco is to provide a permanent representation for the Project Safety Committee and shall develop and implement a safety management system and comprehensive plans to address all aspects of safety in working practices during construction , operation and maintenance.

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Site Access

tie warrants to the Infraco that access to all necessary land can be provided and has committed to an Access Permit Procedure to enable Infraco to enter and remain upon the permanent land for the term of the Agreement and exclusive licence to enter and remain upon designated working areas (the public road) during Infraco Works and shall provide Infraco with all necessary land consents. Works on permanent land or temporary sites by Infraco are subject to compliance with the requirements of third parties and in particular the constraints on site occupation and working practices imposed by EAL at Edinburgh Airport and also NR APA constraints.

Infraco Maintenance

Infraco shall comply with the requirements of the Code of Construction Practice and Code of Maintenance Practice with regard to the maintenance of occupied and adjacent properties, bus stops, bus services and closure of roads. The Infraco is obliged to undertake maintenance of the ETN from the time when any section is completed and afterwards under the full Maintenance Services regime once Service Commencement occurs. The Maintenance Services regime is for ten years post Service Commencement, with a unilateral option for tie to extend for 5 years, subject to any required changes. tie may terminate the Infraco Contract on 6 months' notice at any time after 3 years of ETN operation. Compensation is payable as if such termination had occurred for tie Default.

Contract changes

The Agreement contains a relatively conventional contractual change mechanism in relation to the management and evaluation of changes. Change rules depend upon the type of change instructed whether it is a tie Change, tie Mandatory Change (where an event occurs which needs to be dealt with) or an 'Infraco' Change.

Phase 1b and Network Expansions

Infraco acknowledges that tie may, subject to notice instruct the Phase 1b works to be carried out provided that the election is made no later than 6th July 2009. The Agreement contains a mechanism for estimating the cost of Phase 1b as a tie Change, under which Infraco would carry out Phase 1b works if so instructed. Network Expansion (i.e. a spur, interconnect or modification) would fall to be dealt with as a tie Change under the Change mechanism.

Termination

If tie defaults (on payment exceeding £250,000 overdue for more than 30 days or becomes insolvent) Infraco may serve a termination notice in accordance with the Agreement. The Agreement sets out the treatment of such termination. If Infraco defaults in certain prescribed matters, tie may, after giving required notice, terminate the Agreement. The Agreement again sets out the rules relating to such proposed termination as to final account, compensation (if any) and tie's entitlements to compensation under these provisions. The compensation entitlements are sole remedies.

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Milestones and Payment schedule¶
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The construction sequence is broken down into construction milestones and critical milestones and Procedures have been agreed for the monitoring of progress toward each milestone based upon milestone schedules. Interim pPayments will be made to Infraco monthly subject to and in accordance with the completion of stated Milestones. The Agreement obliges Infraco to complete the Infraco Work in sections and failure to complete sections by the sectional completion date will result in Infraco becoming liable to pay liquidated and ascertained damages to tie at amounts stated in the Agreement. If Infraco are delayed by reason of certain prescribed contractual events they may be able to apply for a Extension of Time and/or claim costs.¶

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Dispute Resolution

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The Agreement contains provision for the settlement of any disputes under a Dispute Resolution Procedure contained in the Schedules to the Infraco Contract.

Disputes are to be dealt with through a rapid escalation process to Chief Executive level **or equivalent** in order to achieve amicable resolution of any unsolved dispute within 15 days. If no settlement is possible, the Chief Executives may elect mediation, adjudication, or court proceedings as the resolution process. The Dispute Resolution Procedure mechanic allows for joinder of related disputes (i.e. **Key sub-contractors, SDS Provider and certain third parties such as NR and EAL**) at the instigation of either party. The provisions are exempt from the application of mandatory adjudication time limits (under the Housing Grants Construction Regeneration Act 1996) by virtue of the Tram Acts.

SDS Novation Agreement and design delivery and approval process

Principles of Novation

The novation of SDS Provider to Infraco involves Infraco taking responsibility for managing SDS to produce the remaining design and related approvals for the Edinburgh Tram Network.

The principal of novation was to ensure that the integration of design and construction is the responsibility of BBS and gives BBS recourse to the same contractual remedies against SDS as tie would have had in that situation, including critically the ability to claim against SDS in relation to defective design carried out by SDS.

SDS Provider Novation outcome

The novation of SDS Provider to the Infraco has been the subject of intense negotiation since preferred bidder announcement. tie's ability to close this element of the procurement as envisaged has been compromised by:

- SDS Provider indifferent performance to design production programme
- BBS increasing visibility of SDS underperformance
- a reluctance by SDS Provider to engage on the terms of the novation
- the evolving status of the Employer's Requirements and the Infraco Proposals
- the negotiating stance of BBS to avoid importing any risk from SDS failure to manage design approval.
- SDS claims relating to earlier periods of design development and previous tie project management's lack of experience in using the SDS Contract to control SDS performance.

There is an SDS Provider parent company guarantee and there is a £500,000 bond which is callable by tie if SDS Provider fails to novate. Post novation tie will hold an SDS Collateral Warranty and a Collateral Warranty from Halcrow, SDS's sub-consultant.

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Design expectations of the Infraco

The Infraco offer is based on design completed to date and a programme for future delivery of design. The offer is also based on those approvals achieved to date and a programme for achieving the remaining prior and technical approvals.

The construction programme included in the final 'Infraco' proposal has been updated to match up with version 26 of the SDS design programme (dated 4 February 2008). The Novation Agreement is based on version 30 of the SDS design programme and the differences between these programmes has been documented and will form the basis of the expected Notified Departure referred to in the programme section above and which has been risk-assessed.

The substantial progress with completion of the SDS design has reduced the risk of late production impacting on the construction programme and has given 'Infraco' greater certainty of the construction needed.

Managing Approvals Risk

The risk of securing approvals has been shared between SDS and tie Ltd. SDS takes the risk of achieving delivery of batches for approval on the agreed date to the agreed quality. That risk is capped at £1,000,000 pounds liquidated damages at approximately £10,000 per package. Provided the application for approval is made on time and the quality of application is in line with agreed expectations then tie Ltd takes the risk that the Council does not process the application within the 8 week period included in the programme. SDS is also incentivised by a bonus pot of £1,000,000 pounds with approximately £10,000 attaching to each deliverable package. The bonus is lost if the programme date is missed for any reason other than tie Change.

The management of this risk has begun long before the application for approval is made. Designs have been reviewed progressively throughout their development involving the relevant Council officials and representatives of other approval bodies. Before applications are made for prior approval there is an 8-week period of informal consultation on top of the earlier involvement in design development. Addressing the comments received from informal consultation significantly improves the design and the chances of the Council being able to process an application within the 8 week formal period.

Design Guidance

In developing the current design, SDS has been under an obligation to take account of inter alia :

- the provisions of the Tram Acts
- the Environmental Statement
- statutory and supplemental planning guidance from the Scottish Government and City of Edinburgh Council
- the Tram Design Manual
- all third party agreements in relation to the project
- UK guidance on the safe design and operation of tram systems

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The original 'Infraco' construction programme was based on version 22 of the SDS design programme (dated X); t

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This matter is now enshrined in the Employer's Requirements.

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Employer's Requirements

The Infraco Proposals and the Employer's Requirements

No comprehensive legal review has been instructed by tie in relation to the Infraco Proposals, on the basis that these are technical responses to the outline Employer's Requirements issued initially by tie in October 2006 at ITN stage and then progressively until selection of preferred bidder in October 2007.

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Since DLAP's initial exercise there have been several further iterations of the Employer's Requirements which have been controlled by tie's technical team but no further legal review. Consequently, DLAP cannot give legal assurance regarding the current content of the Employer's Requirements and their consistency with the Infraco core terms and conditions. BBS' position as of 4 March 2008 was that they could not sign the Infraco Contract without a thorough review of the Employer's Requirements by their legal team. tie has instructed SDS to carry out an exercise to bring the Employer's Requirements and the Infraco Proposals into alignment so that SDS Provider are able to confirm that their design will be in compliance the Employer's Requirements. This may result in further changes to the Employer's Requirements and/or the Infraco Proposals and/or the SDS design.

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The risk created by discrepancies between the version of the Employer's Requirements eventually settled on and the Infraco core terms and conditions lies in the Infraco attempting to exploit ambiguity to engineer the need for tie Change or Relief when none is in fact justified. tie project management will need to be vigilant in identifying and closing off such opportunities, using the mitigating contract provisions which impose duties on Infraco to respect ambiguities and discrepancies and permits tie Representative to interpret provisions to avoid these difficulties.

Advance purchase materials

CEC have required explanation as to what happens if BBS advance purchase to support unapproved design: the risk relating to advance purchase materials is with BBS if material is purchased to support unapproved design or design that has not been consented.

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Infraco Payment mechanism

Construction

Payment under the Infraco Contract is entirely against a 4 weekly application from Infraco in respect of milestones which have previously been certified by tie as having been achieved. The milestone schedule reflects the Infraco price allocated in amounts to series of construction milestones and critical milestones and to the future period in which each milestone is expected to be achieved in accordance with the agreed programme.

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The milestone schedule and certification mechanism has been prepared and agreed in accordance with the following key principles:

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- Save in respect of agreed advance payments, Infraco will not be paid in advance of its own outgoing cash flows through its own supply chain
- The individual milestones are defined such that the process of determining whether or not they have been achieved will be subject to the minimum of uncertainty or dispute
- The certification of a milestone will require evidence that all required relevant consents and approvals have been delivered in respect of the related works

The contract provides an effective mechanism for the addition and change to milestones (valuation or date) initiated by either tie or Infraco.

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Infraco will submit a detailed claim for payment within 3 business days of the end of each 4 week reporting period in respect of milestones certified as achieved following which tie will have 5 business days to certify the total payment and a further 15 business days to make payment. There are no express retentions of payment, but a retention bond is provided as explained below and tie has a contractual right of set off.

Commissioning and Maintenance

Infraco will commission Phase 1a in 4 key sections, transfer title accordingly and hand over control of each section to the operator and maintainers:

- Section A – The depot, certified after system acceptance test T1 has been passed for that section;
- Section B – Depot to the Airport, certified after system acceptance test T1 has been passed for that section;
- Section C – The rest of Phase 1a, certified after system acceptance test T1 has been passed for that section and system acceptance test T2 has been passed for Phase 1a, and
- Section D – Driver training and commissioning, certified after system performance test T3 has been passed for Phase 1a.

Certification of Section D requires that in addition to passing the system performance demonstration all relevant consents and approvals (except those that have time conditionality) have been obtained and documentation and initial spares have been delivered.

After the period of trial running without passengers has been completed, passenger service will commence.

During the commissioning period, Infraco will be paid Mobilisation Milestone Payments according to the programme for establishing the maintenance organisation and systems. The Operator, Transdev, will be paid on a 4 week reporting period basis up to a maximum of a capped sum for the commissioning activities as a whole.

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After the commencement of passenger operation, the Operator and the Infraco will be paid their respective operating and maintenance fees on a 4 week reporting period basis. The performance of the delivered systems in passenger service will be monitored against two final system acceptance test criteria, Network Performance test T4 and Reliability test T5. After the Reliability Certificate has been issued (Service Commencement + approximately 9 months) then the 4 weekly fees paid will be subject to the performance regime.

Infraco performance security arrangements

Bonds during construction period

Two bonds are being provided by Infraco from Standard & Poors A- rated financial institutions (confirmed to be ANZ Bank and Deutsche Bank), a Performance Bond and a Retention Bond. Both bonds are in substance 'on-demand', meaning there is no requirement that proof of failure (beyond formal notification) by Infraco must be produced by tie before a claim can be made under the bond.

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The Performance Bond is in the amount of approximately £23m throughout the construction period reducing to £11.5m when a certificate of Revenue Service Commitment is issued and further reducing to £9.2m when a certificate of Network Certificate relating to the achievement of performance criteria is issued. The issue of the aforementioned certificates is subject to a rigorous testing regime as defined in the Employers Requirements, including evidence that all relevant consents and approvals have been delivered, and provides both security for tie/CEC and incentive to Infraco to perform.

The Retention Bond is in the amount of £2m initially, adjusting to the following amounts at sectional completion:

- £4m section A – The depot
- £6m section B – Depot to the Airport
- £8m section C – The rest of Phase 1a
- £10m section D – Driver training and commissioning
- £6m at issue of Network Certificate (pertaining to reliability as defined in the Employers Requirements)

The Retention Bond is released when a Reliability Certificate is issued.

The Operator provides a Performance Bond in amount of £10,000,000 from a financial institution of good credit. The Bond is 'on-demand', meaning there is no requirement for proof of failure by the Operator to be produced by tie before a claim can be made under the bond.

During the maintenance phase post Service Commencement, Infraco is required to provide a performance security (or submit to a cash deposit/retention regime) at any time that there is determined (by survey) to be remedial work of a value greater than the minimum to reinstate the Edinburgh Tram Network assets to the Handback Condition. The security may be up to £1,000,000 on pre-agreed terms.

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Parent Company Guarantees (PCGs)

PCGs are provided by the ultimate holding companies of both Infraco consortium members in respect of all performance, financial and other obligations of their subsidiaries which are contracting with tie. The substance of these two German entities, which are the group holding companies in each case, has been subject to financial verification by tie.

The PCGs respect the joint and several liability provisions in the Infraco contract; each claim by tie under the PCG's must be served on each of the parent companies in the proportion of their share of the Infraco consortium but in the event of either parent company failing to honour payment of such a claim, the other parent company is liable up to the limit of overall liability specified in the Infraco contract (20% of the Infraco contract price but subject to graduated step down over 10 years).

The PCGs provide that in the event of a change in control or ownership of the subsidiary companies which are entering into the Infraco contract, the PCG's remain in force until a replacement PCG has been provided on terms which are acceptable to tie. PCGs cover liability for latent defects, patent defects, pre existing obligations and third party claims arising from latent defects (up to £9,000,000). Liability for maintenance related activity is capped at £3.5 million pounds.

All obtainable necessary collateral warranties have been agreed, and provided for as requirements of Infraco.

Brief Overview of Tramco contract terms

Authority to Transact

This is dealt with in the same manner as under the Infraco Contract.

Joint and Several Liability

This issue is not relevant as CAF is sole Counterparty to both agreements.

Conditions Precedent

As for Infraco Contract.

Indemnities

The indemnity provision is back to back (as required) with the Infraco Contract.

Warranties

The Three principal Warranties relate to:

Tram defects - two years from maintenance commitment

Paint and finishes - six years from maintenance commitment

Key Parts - 10 years from maintenance commitment

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Consents

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The Tramco is required to support the obtaining of relevant operational Consents and permits and is responsible for obtaining Consents relating to the tram vehicles themselves.

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Termination

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Both Tramco contracts contain conventional and rolling stock market aligned termination provisions for Supplier default, no fault (30 days notice), client default, force majeure and corrupt gifts and fraud. No termination of the Tramco contracts cannot be terminated by Infraco post novation without tie's approval.

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Trams will be supplied pursuant to a Tram Supply Agreement between tie Limited and Contrucciones y Auxilliar de Ferrocarrilles S.A (CAF) "Tramco". Tramco are to carry out the Tram works and design, manufacture, engineer, supply, test, commission deliver and provide 27 trams and if required any additional trams in accordance with the Employer's Requirements, the tram Suppliers Proposal and agreed programme. Tramco shall ensure that all data, component, systems, devices, equipment, software and mechanism incorporated in the trams are fit for purpose and compatible with each other. Tramco shall operate under good industry practice, comply with all applicable laws and consents and ensure that each tram meets the required standards. The parties have agreed to work in mutual cooperation to fulfil the agreed roles and responsibilities to carry out and complete the tram works in accordance with the Agreement. Tramco shall deliver and finalise the designs, design data and all other deliverables as prescribed in the Employer's Requirements.

System Integration

Tramco shall provide support in respect of the key elements of system integration of the tram works with the Edinburgh Tram Network.

Operator Interface

Tramco acknowledges that the operator shall be responsible for the Operator Maintenance of the Edinburgh Tram Network and that Tramco would at all times liaise with the Operator.

Contract changes

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In similar fashion to Infraco, the Agreement allows for the introduction of changes either by tie or Tramco always subject to notices and prescribed rules. tie may, subject to notice and terms, order additional trams with related spare parts and special tools.

Quality Assurance

Tramco shall at all times utilise a Project Quality Assurance Programme compliant to standards. A tram manufacturing and delivery programme is agreed and regular monitoring of progress will take place.

There is provision in the Agreement for tie to be involved in inspecting the trams at various stages of the manufacturing process. Tramco shall deliver the trams to the designated point of delivery at the depot and delivery tests shall be conducted. Tramco, tie and the operator shall agree a training programme and the detailed implementation.

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Transfer of Title

Tramco shall provide Trams free from all security interests title to CEC on delivery or, in certain circumstances, at factory. Ownership earlier than this would expose CEC to not be able to reject a defective tram.

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2.11 Tramco payment mechanism

Supply agreement

The payment mechanism under the supply contract conforms substantially to that under the Infraco contract as described above with the milestone payments heavily weighted towards:

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- Initial mobilisation and establishment of supply chain
- Delivery of tram vehicles
- Attainment of performance and reliability standards as specified

2.12 Tramco performance security arrangements

Bonds during supply period

Tramco will provide a Reliability bond in the defined amount of 5% of the Tramco price such bond to be provided on or before the due date of delivery of the first Tram vehicle. A further advance payment bond is to be provided to tie.

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Parent Company Guarantee (PCG)

The supply and maintenance contracts with Tramco are with the ultimate holding company so the issue of a PCG does not arise. The liability cap of Tramco under the tram supply agreement is 20% of the Tramco supply price.

Maintenance agreement

The Infraco is responsible for providing tram maintenance through Tramco performing the tram maintenance agreement. This is a relatively standard agreement, developed from UK sector models.

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Performance securities under maintenance agreement

Tramco is required to provide a security at any time that there is determined by survey to be remedial work of a value greater than £50,000 required to reinstate the Tram assets to the Handback Condition,. This may either be in the form of a cash deposit or an on-demand Handback Bond covering the full value of the remedial work outstanding. The liability cap of the Tramco under the tram maintenance agreement is 18.5% of the aggregate 30 year Tram maintenance price.

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CEC Financial Guarantee

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CEC are required to provide a guarantee to the Infraco of the financial obligations (including future variations) of tie under the Infraco contract in recognition of the fact that tie on its own has no capacity to bear any financial commitment insofar as it is not 'back to back' with the funding of the project which is channelled through CEC. In this sense it is materially consistent with the provisions of the PCGs (including periods allowed for payment of amounts due) provided by the Infraco, except that it is a guarantee of financial obligations only and not of performance. The CEC Guarantee will be released upon issue of the ETN Reliability Certificate, that is to say approximately nine to twelve months after Service Commencement. Any pre-existing claims will survive release until settled.

The terms and conditions of the CEC Guarantee and in particular its call mechanics, liability cap and protections are in line with market practice for this type of instrument. It should be noted that the Guarantee may be called upon by the Infraco on multiple occasions if tie is in payment default more than once. The instrument has been drafted, negotiated and settled with direct involvement and support of CEC Legal and Finance.

The guarantee is provided to Infraco meaning either or both of Bilfinger & Berger UK Limited or Siemens PLC or their assignees as permitted and approved under the Infraco contract.

CEC will benefit from the same contractual defences and entitlements to set off as tie and will have no liability greater. No claim can be made for an amount which is in dispute if it has been referred to the dispute resolution.

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The practical day-to-day implication of the Guarantee is that its provisions will not be invoked so long as the process for drawdown of cash from CEC to tie to meet payment obligations as they fall due is uninterrupted. Any dispute under the Guarantee would be subject to Scottish court proceedings.

Tie Limited

28th April 2008

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REPORT ON INFRACO CONTRACT SUITE

Content of this section

- Process of drafting, negotiation, review and quality control
- General description of scope, parties and contract structure
- Overview of Infraco contract terms
- SDS Novation Agreement and design delivery and approval process
- Confirmation of BBS acceptance of modelling
- Employer's Requirements and Infraco & Tramco Proposals
- Advance purchase materials
- Infraco payment mechanism
- Infraco performance security arrangements
- Overview of Tramco contract terms
- Tramco payment mechanism
- Tramco performance security arrangements

Process of drafting, negotiation, review and quality control

The structure, membership and competence of the tie / TEL commercial and technical negotiating team has been assessed by tie and has remained largely consistent since the bid evaluation process commenced. Council officers have operated in an integrated manner with the main negotiating team, which has also had extensive support from our external legal advisors (in DLA Piper's case from late September 2007 onwards, following instruction to disengage from the process in May 2007), Transdev and other advisors.

Appropriate quality control procedures have been applied to finalisation of the Infraco contract suite. In a number of critical areas, senior tie and TEL people have performed a review of terms independent of the main negotiating team, the important elements of which are set out in this report. The TPB, TEL and tie Boards have been regularly kept abreast of progress in all important areas and have confirmed or redirected effort as appropriate. Communications on these key matters with senior Council officers has been conducted both through the TPB and its sub-committees and also through frequent informal contact. Finally, the OGC Gateway 3 Review Team examined key areas of the contract suite before approval in advance of the October 2007 Council meeting.

In broad terms, the principal pillars of the ETN contract suite in terms of scope and risk transfer have not changed materially since the approval of the Final Business Case in October 2007. The process of negotiation and quality control has operated effectively to ensure the final contract terms are robust and that where risk allocation has altered this has been adequately reflected in suitable commercial compromises.

This report is not a substitute for reading the Contract itself. It is focussed on those provisions in which CEC has expressed particular interest and has directed tie should be included in the report. It should be understood that the ETN Contract Suite has undergone a lengthy and difficult negotiation and close out phase. BBS has on a number of occasions moved from a previous firm position and this has required detailed re-examination and recasting of contractual provisions in order to reinstate acceptability.

General description of scope, parties and contract structure

The Infraco contract suite comprises the following principal contracts :

- Infraco system design, construction and maintenance contract between tie and BBS;
- Employer's Requirements and Infraco Proposals;
- Tramco vehicle supply and maintenance contracts between tie and CAF;
- Tramco Novation Agreement establishing Infraco – Tramco arrangements;
- SDS Novation Agreement establishing Infraco – SDS Provider arrangements;
- Security documentation; and
- Ancillary agreements and Collateral Warranties
- Pricing and payment arrangements

Overview of Infraco contract terms

The Infraco Works are to be carried out pursuant to an Infraco Contract between tie Ltd and Bilfinger Berger (UK) Limited and Siemens plc. Bilfinger Berger (UK) Limited and Siemens plc have formed an unincorporated consortium to carry out the Infraco Works and are together called the 'Infraco', each company separately being an Infraco Member. Bilfinger Berger (UK) Limited and Siemens plc have joint and several liability for the performance and discharge of all obligations under the Infraco Contract and the three novated agreements that will be housed within it.

Authority to Transact

The legal authority of the various counterparties to tie and to CEC (under its Guarantee) will be confirmed in the conventional manner:

- each party will produce certified board minutes or other legally competent evidence of the corporate decision to enter into the ETN Contract Suite;
- all signatories will demonstrate legally effective power of attorney from their respective organisations; and
- in relation to foreign companies, an external counsel's opinion covering the legally binding nature of the corporate acts (re Contract execution) carried out in accordance with corporate governance, the signatories' delegated authority and the enforceability of the Contracts against the parties through the courts in their respective home jurisdictions.

CEC and tie will be required to produce their own legal authority to transact as has been explained and agreed previously with CEC Legal.

The Infraco Contract executed by tie Limited, Bilfinger Berger (UK) Limited and Siemens plc comprises the Core Terms and Conditions and a series of detailed Schedules which contain the price for and the scope of the Infraco Works and amplify the responsibilities and commitments accepted by the Infraco.

Conditions Precedent

At present, the draft Infraco Contract provides that the delivery of various ancillary agreements (notably the novations and the performance security package) are conditions precedent to Contract effectiveness. As tie's intention is for all documentation to be closed, provided and executed simultaneously, this technical provision may be removed prior to contract award date.

Warranties

The Infraco members provide key individual warranties regarding the Infraco Proposals meeting the Employer's Requirements and regarding their capacity to enter into the Infraco Agreement.

Duty of Care and General Obligations

Under the Infraco Contract, the Infraco has a duty of care and general obligation to carry out and complete the Infraco Works fully in accordance with the Agreement. Infraco is further obligated to procure that the Infraco Parties (the Infraco members and their agents, advisors, consultants and sub contractors) carry out the Infraco Works in accordance with, inter alia, the Contract, the general Law and stipulated tie and CEC policies to enable the Edinburgh Tram Network to be designed, constructed, installed, integrated, tested, commissioned and thereafter maintained. The scope for which the Infraco has contracted is contained in the Employer's Requirements and the Infraco Proposals. The Infraco is committed to interface with Transdev as the system operator.

Indemnity Provisions

Generally, the Infraco must indemnify tie and CEC from all losses incurred as a result of a breach of the Infraco Contract by the Infraco or negligent or wilful acts of the Infraco. This includes where the breach or negligence causes:

- death or injury;
- damage to property or to the Infraco Works;
- infringement of third party IPR;
- causing tie or CEC to breach any law, consents, disclosed third party agreements or undertakings entered into prior to the date of the Infraco Contract;
- causing tie or CEC to breach the Network Rail Asset Protection Agreement, the DPOFA or the Tram Inspector Agreement.

The Infraco is wholly responsible to tie for any actions or omissions of its employees, agents, advisers and sub-contractors.

Principal Exclusions are the following:

- any act or omission of tie or CEC is the cause of such death, injury or damage to property;
- proportion of loss caused by tie/CEC;
- indirect losses of tie/CEC by reason of Infraco breach or negligence, but certain indirect losses claimed by a third party are carved out of this prohibition. Infraco would therefore be liable to indemnify tie/CEC against a claim for lost revenue asserted by a business for physical damage caused by Infraco's breach, but not for economic loss, unless flowing from physical damage or otherwise insured.
- Insurance deductibles and excesses where the claim has been caused by CEC/tie's contributory fault or because tie has altered OCIP to accept a higher level of excess or deductible.
- any liability incurred by Infraco to a third party where Infraco is performing its obligations in accordance with the Agreement (i.e. claims in nuisance).

ETN Assets

The Agreement provides for the direct transfer of title to CEC in all materials, goods, and equipment which are intended to be part of the completed Edinburgh Tram Network. Infraco shall procure that all ETN assets are supplied free from security interests and that any goods or materials stored off site are identified as belonging to CEC, wherever practicable.

Price

A contract price has been agreed. The detailed contract price and pricing schedules for carrying out the Infraco Works is contained in Schedules to the Infraco Contract. A substantial portion of the Contract Price is agreed on a lump sum fixed price basis. There are certain work elements that cannot be definitively concluded in price and therefore Provisional Sums are included. A number of core pricing and programming assumptions have been agreed as the basis for the Contract Price. If these do not hold, Infraco is entitled to a price and programme variation known as "Notified Departure".

Programme

The Agreement provides that Infraco shall progress the Infraco Works to achieve timeous delivery and completion of the Infraco Works (or parts thereof) and in their obligations under the Agreement, all in accordance with an agreed Programme which is bound into the Schedules. This Programme is the product of tie, Infraco and SDS Provider negotiations and is cardinal to the control of Infraco and SDS Provider's performance and their potential entitlements to relief or additional payment. Following contract signature, it is expected that BBS will seek a Notified Departure on Programme due to SDS delay in design production. However, both BBS and SDS have a contractual obligation to mitigate. The exposure has been assessed in detail by tie and confirmed as acceptably within the risk contingency.

Milestones and Payment schedule

The construction sequence is broken down into construction milestones and critical milestones and Procedures have been agreed for the monitoring of progress toward each milestone based upon milestone schedules. Interim payments will be made to Infraco 4-weekly subject to and in accordance with the completion of stated Milestones. The Agreement obliges Infraco to complete the Infraco Work in sections and failure to complete sections by the sectional completion date will result in Infraco becoming liable to pay liquidated and ascertained damages to tie at amounts stated in the Agreement. If Infraco are delayed by reason of certain prescribed contractual events they may be able to apply for an Extension of Time and/or claim costs.

Novations

The Agreement provides that, as a condition precedent, Infraco shall enter into and execute Novation Agreements to incorporate and bind previous agreements between tie and the design provider (SDS), the Tram supplier (Tramco) and the Tram Maintenance provider (Tramco), into the Infraco Contract. These agreements therefore become the full responsibility of Infraco as an essential component of the carrying out of the Infraco Works. In addition to the Novation Agreements, assignable collateral warranties are to be provided to tie by the design provider (SDS), the Tram supplier (Tramco) and the Tram Maintenance provider (Tramco).

Network Rail Interface

Under the Infraco Contract, Infraco acknowledges that it will require to comply with the Asset Protection Agreement (APA) between tie / CEC and Network Rail in relation to the Edinburgh Tram Network. Infraco are to comply with the APA and undertake not to put tie/CEC in breach of it. The APA has been stepped down into the Infraco Contract so that the Infraco is fully on notice of those obligations which it will perform on behalf of tie/CEC.

Operator Interface

The Infraco's interface with Transdev is dealt with through Clause 17 of the Agreement. A duty of liaison and cooperation is imposed. Interference with maintenance works by the Operator may entitle an Infraco to claim for a Compensation Event and conversely any adverse affect of unplanned maintenance/defective maintenance would give rise to a right of indemnity for tie against any Transdev claim for relief/cost under the DPOFA. Any change to tram operations which adversely impacts the Infraco maintenance could give rise to a tie Change.

Safety

Infraco is to provide a permanent representation for the Project Safety Committee and shall develop and implement a safety management system and comprehensive plans to address all aspects of safety in working practices during construction , operation and maintenance.

Site Access

tie warrants to the Infraco that access to all necessary land can be provided and has committed to an Access Permit Procedure to enable Infraco to enter and remain upon the permanent land for the term of the Agreement and exclusive licence to enter and remain upon designated working areas (the public road) during Infraco Works and shall provide Infraco with all necessary land consents. Works on permanent land or temporary sites by Infraco are subject to compliance with the requirements of third parties and in particular the constraints on site occupation and working practices imposed by EAL at Edinburgh Airport and also NR APA constraints.

Infraco Maintenance

Infraco shall comply with the requirements of the Code of Construction Practice and Code of Maintenance Practice with regard to the maintenance of occupied and adjacent properties, bus stops, bus services and closure of roads. The Infraco is obliged to undertake maintenance of the ETN from the time when any section is completed and afterwards under the full Maintenance Services regime once Service Commencement occurs. The Maintenance Services regime is for ten years post Service Commencement, with a unilateral option for tie to extend for 5 years, subject to any required changes. tie may terminate the Infraco Contract on 6 months' notice at any time after 3 years of ETN operation. Compensation is payable as if such termination had occurred for tie Default.

Contract changes

The Agreement contains a relatively conventional contractual change mechanism in relation to the management and evaluation of changes. Change rules depend upon the type of change instructed whether it is a tie Change, tie Mandatory Change (where an event occurs which needs to be dealt with) or an 'Infraco' Change.

Phase 1b and Network Expansions

Infraco acknowledges that tie may, subject to notice instruct the Phase 1b works to be carried out provided that the election is made no later than 6th July 2009. The Agreement contains a mechanism for estimating the cost of Phase 1b as a tie Change under which Infraco would carry out Phase 1b works if so instructed. Network Expansion (i.e. a spur, interconnect or modification) would fall to be dealt with as a tie Change under the Change mechanism.

Termination

If tie defaults (on payment exceeding £250,000 overdue for more than 30 days or becomes insolvent) Infraco may serve a termination notice in accordance with the Agreement. The Agreement sets out the treatment of such termination. If Infraco defaults in certain prescribed matters, tie may, after giving required notice, terminate the Agreement. The Agreement again sets out the rules relating to such proposed termination as to final account, compensation (if any) and tie's entitlements to compensation under these provisions. The compensation entitlements are sole remedies.

Dispute Resolution

The Agreement contains provision for the settlement of any disputes under a Dispute Resolution Procedure contained in the Schedules to the Infraco Contract.

Disputes are to be dealt with through a rapid escalation process to Chief Executive level or equivalent in order to achieve amicable resolution of any unsolved dispute within 15 days. If no settlement is possible, the Chief Executives may elect mediation, adjudication, or court proceedings as the resolution process. The Dispute Resolution Procedure mechanic allows for joinder of related disputes (i.e. Key sub-contractors, SDS Provider and certain third parties such as NR and EAL) at the instigation of either party. The provisions are exempt from the application of mandatory adjudication time limits (under the Housing Grants Construction Regeneration Act 1996) by virtue of the Tram Acts.

SDS Novation Agreement and design delivery and approval process

Principles of Novation

The novation of SDS Provider to Infraco involves Infraco taking responsibility for managing SDS to produce the remaining design and related approvals for the Edinburgh Tram Network.

The principal of novation was to ensure that the integration of design and construction is the responsibility of BBS and gives BBS recourse to the same contractual remedies against SDS as tie would have had in that situation, including critically the ability to claim against SDS in relation to defective design carried out by SDS.

SDS Provider Novation outcome

The novation of SDS Provider to the Infraco has been the subject of intense negotiation since preferred bidder announcement. tie's ability to close this element of the procurement as envisaged has been compromised by:

- SDS Provider indifferent performance to design production programme
- BBS increasing visibility of SDS underperformance
- a reluctance by SDS Provider to engage on the terms of the novation
- the evolving status of the Employer's Requirements and the Infraco Proposals
- the negotiating stance of BBS to avoid importing any risk from SDS failure to manage design approval.
- SDS claims relating to earlier periods of design development and previous tie project management's lack of experience in using the SDS Contract to control SDS performance.

There is an SDS Provider parent company guarantee and there is a £500,000 bond which is callable by tie if SDS Provider fails to novate. Post novation tie will hold an SDS Collateral Warranty and a Collateral Warranty from Halcrow, SDS's sub-consultant.

Design expectations of the Infraco

The Infraco offer is based on design completed to date and a programme for future delivery of design. The offer is also based on those approvals achieved to date and a programme for achieving the remaining prior and technical approvals.

The construction programme included in the final 'Infraco' proposal has been updated to match up with version 26 of the SDS design programme (dated 4 February 2008). The Novation Agreement is based on version 30 of the SDS design programme and the differences between these programmes has been documented and will form the basis of the expected Notified Departure referred to in the programme section above and which has been risk-assessed.

The substantial progress with completion of the SDS design has reduced the risk of late production impacting on the construction programme and has given 'Infraco' greater certainty of the construction needed.

Managing Approvals Risk

The risk of securing approvals has been shared between SDS and tie Ltd. SDS takes the risk of achieving delivery of batches for approval on the agreed date to the agreed quality. That risk is capped at £1,000,000 pounds liquidated damages at approximately £10,000 per package. Provided the application for approval is made on time and the quality of application is in line with agreed expectations then tie Ltd takes the risk that the Council does not process the application within the 8 week period included in the programme. SDS is also incentivised by a bonus pot of £1,000,000 pounds with approximately £10,000 attaching to each deliverable package. The bonus is lost if the programme date is missed for any reason other than tie Change.

The management of this risk has begun long before the application for approval is made. Designs have been reviewed progressively throughout their development involving the relevant Council officials and representatives of other approval bodies. Before applications are made for prior approval there is an 8-week period of informal consultation on top of the earlier involvement in design development. Addressing the comments received from informal consultation significantly improves the design and the chances of the Council being able to process an application within the 8 week formal period.

Design Guidance

In developing the current design, SDS has been under an obligation to take account of inter alia :

- the provisions of the Tram Acts
- the Environmental Statement
- statutory and supplemental planning guidance from the Scottish Government and City of Edinburgh Council
- the Tram Design Manual
- all third party agreements in relation to the project
- UK guidance on the safe design and operation of tram systems

Confirmation of BBS acceptance of modelling

This matter is now enshrined in the Employer's Requirements.

Employer's Requirements

The Infraco Proposals and the Employer's Requirements

No comprehensive legal review has been instructed by tie in relation to the Infraco Proposals, on the basis that these are technical responses to the outline Employer's Requirements issued initially by tie in October 2006 at ITN stage and then progressively until selection of preferred bidder in October 2007.

Since DLAP's initial exercise there have been several further iterations of the Employer's Requirements which have been controlled by tie's technical team but no further legal review. Consequently, DLAP cannot give legal assurance regarding the current content of the Employer's Requirements and their consistency with the Infraco core terms and conditions. BBS' position as of 4 March 2008 was that they could not sign the Infraco Contract without a thorough review of the Employer's Requirements by their legal team. tie has instructed SDS to carry out an exercise to bring the Employer's Requirements and the Infraco Proposals into alignment so that SDS Provider are able to confirm that their design will be in compliance the Employer's Requirements. This may result in further changes to the Employer's Requirements and/or the Infraco Proposals and/or the SDS design.

The risk created by discrepancies between the version of the Employer's Requirements eventually settled on and the Infraco core terms and conditions lies in the Infraco attempting to exploit ambiguity to engineer the need for tie Change or Relief when none is in fact justified. tie project management will need to be vigilant in identifying and closing off such opportunities, using the mitigating contract provisions which impose duties on Infraco to respect ambiguities and discrepancies and permits tie Representative to interpret provisions to avoid these difficulties.

Advance purchase materials

CEC have required explanation as to what happens if BBS advance purchase to support unapproved design: the risk relating to advance purchase materials is with BBS if material is purchased to support unapproved design or design that has not been consented.

Infraco Payment mechanism

Construction

Payment under the Infraco Contract is entirely against a 4 weekly application from Infraco in respect of milestones which have previously been certified by tie as having been achieved. The milestone schedule reflects the Infraco price allocated in amounts to series of construction milestones and critical milestones and to the future period in which each milestone is expected to be achieved in accordance with the agreed programme.

The milestone schedule and certification mechanism has been prepared and agreed in accordance with the following key principles:

- Save in respect of agreed advance payments, Infraco will not be paid in advance of its own outgoing cash flows through its own supply chain
- The individual milestones are defined such that the process of determining whether or not they have been achieved will be subject to the minimum of uncertainty or dispute
- The certification of a milestone will require evidence that all required relevant consents and approvals have been delivered in respect of the related works

The contract provides an effective mechanism for the addition and change to milestones (valuation or date) initiated by either tie or Infraco.

Infraco will submit a detailed claim for payment within 3 business days of the end of each 4 week reporting period in respect of milestones certified as achieved following which tie will have 5 business days to certify the total payment and a further 15 business days to make payment. There are no express retentions of payment, but a retention bond is provided as explained below and tie has a contractual right of set off.

Commissioning and Maintenance

Infraco will commission Phase 1a in 4 key sections, transfer title accordingly and hand over control of each section to the operator and maintainers:

- Section A – The depot, certified after system acceptance test T1 has been passed for that section;
- Section B – Depot to the Airport, certified after system acceptance test T1 has been passed for that section;
- Section C – The rest of Phase 1a, certified after system acceptance test T1 has been passed for that section and system acceptance test T2 has been passed for Phase 1a, and
- Section D – Driver training and commissioning, certified after system performance test T3 has been passed for Phase 1a.

Certification of Section D requires that in addition to passing the system performance demonstration all relevant consents and approvals (except those that have time conditionality) have been obtained and documentation and initial spares have been delivered.

After the period of trial running without passengers has been completed, passenger service will commence.

During the commissioning period, Infraco will be paid Mobilisation Milestone Payments according to the programme for establishing the maintenance organisation and systems. The Operator, Transdev, will be paid on a 4 week reporting period basis up to a maximum of a capped sum for the commissioning activities as a whole.

After the commencement of passenger operation, the Operator and the Infraco will be paid their respective operating and maintenance fees on a 4 week reporting period basis. The performance of the delivered systems in passenger service will be monitored against two final system acceptance test criteria, Network Performance test T4 and Reliability test T5. After the Reliability Certificate has been issued (Service Commencement + approximately 9 months) then the 4 weekly fees paid will be subject to the performance regime.

Infraco performance security arrangements

Bonds during construction period

Two bonds are being provided by Infraco from Standard & Poors A- rated financial institutions (confirmed to be ANZ Bank and Deutsche Bank), a Performance Bond and a Retention Bond. Both bonds are in substance 'on-demand', meaning there is no requirement that proof of failure (beyond formal notification) by Infraco must be produced by tie before a claim can be made under the bond.

The Performance Bond is in the amount of approximately £23m throughout the construction period reducing to £11.5m when a certificate of Revenue Service Commitment is issued and further reducing to £9.2m when a certificate of Network Certificate relating to the achievement of performance criteria is issued. The issue of the aforementioned certificates is subject to a rigorous testing regime as defined in the Employers Requirements, including evidence that all relevant consents and approvals have been delivered, and provides both security for tie/CEC and incentive to Infraco to perform.

The Retention Bond is in the amount of £2m initially, adjusting to the following amounts at sectional completions:

- £4m section A – The depot
- £6m section B – Depot to the Airport
- £8m section C – The rest of Phase 1a
- £10m section D – Driver training and commissioning
- £6m at issue of Network Certificate (pertaining to reliability as defined in the Employers Requirements)

The Retention Bond is released when a Reliability Certificate is issued.

The Operator provides a Performance Bond in amount of £10,000,000 from a financial institution of good credit. The Bond is 'on-demand', meaning there is no requirement for proof of failure by the Operator to be produced by tie before a claim can be made under the bond.

During the maintenance phase post Service Commencement, Infraco is required to provide a performance security (or submit to a cash deposit/retention regime) at any time that there is determined (by survey) to be remedial work of a value greater than the minimum to reinstate the Edinburgh Tram Network assets to the Handback Condition. The security may be up to £1,000,000 on pre-agreed terms.

Parent Company Guarantees (PCGs)

PCGs are provided by the ultimate holding companies of both Infraco consortium members in respect of all performance, financial and other obligations of their subsidiaries which are contracting with tie. The substance of these two German entities, which are the group holding companies in each case, has been subject to financial verification by tie.

The PCGs respect the joint and several liability provisions in the Infraco contract; each claim by tie under the PCG's must be served on each of the parent companies in the proportion of their share of the Infraco consortium but in the event of either parent company failing to honour payment of such a claim, the other parent company is liable up to the limit of overall liability specified in the Infraco contract (20% of the Infraco contract price but subject to graduated step down over 10 years).

The PCGs provide that in the event of a change in control or ownership of the subsidiary companies which are entering into the Infraco contract, the PCG's remain in force until a replacement PCG has been provided on terms which are acceptable to tie. PCGs cover liability for latent defects, patent defects, pre existing obligations and third party claims arising from latent defects (up to £9,000,000). Liability for maintenance related activity is capped at £3.5 million pounds.

All obtainable necessary collateral warranties have been agreed, and provided for as requirements of Infraco.

Brief Overview of Tramco contract terms

Authority to Transact

This is dealt with in the same manner as under the Infraco Contract.

Joint and Several Liability

This issue is not relevant as CAF is sole Counterparty to both agreements.

Conditions Precedent

As for Infraco Contract.

Indemnities

The indemnity provision is back to back (as required) with the Infraco Contract.

Warranties

The Three principal Warranties relate to:

- Tram defects - two years from maintenance commitment
- Paint and finishes - six years from maintenance commitment
- Key Parts - 10 years from maintenance commitment

Consents

The Tramco is required to support the obtaining of relevant operational Consents and permits and is responsible for obtaining Consents relating to the tram vehicles themselves.

Termination

Both Tramco contracts contain conventional and rolling stock market aligned termination provisions for Supplier default, no fault (30 days notice), client default, force majeure and corrupt gifts and fraud. No termination of the Tramco contracts cannot be terminated by Infraco post novation without tie's approval.

Trams will be supplied pursuant to a Tram Supply Agreement between tie Limited and Contruccion y Auxilliar de Ferrocarriles S.A (CAF) "Tramco". Tramco are to carry out the Tram works and design, manufacture, engineer, supply, test, commission deliver and provide 27 trams and if required any additional trams in accordance with the Employer's Requirements, the tram Suppliers Proposal and agreed programme. Tramco shall ensure that all data, component, systems, devices, equipment, software and mechanism incorporated in the trams are fit for purpose and compatible with each other. Tramco shall operate under good industry practice, comply with all applicable laws and consents and ensure that each tram meets the required standards. The parties have agreed to work in mutual cooperation to fulfil the agreed roles and responsibilities to carry out and complete the tram works in accordance with the Agreement. Tramco shall deliver and finalise the designs, design data and all other deliverables as prescribed in the Employer's Requirements.

System Integration

Tramco shall provide support in respect of the key elements of system integration of the tram works with the Edinburgh Tram Network.

Operator Interface

Tramco acknowledges that the operator shall be responsible for the Operator Maintenance of the Edinburgh Tram Network and that Tramco would at all times liaise with the Operator.

Contract changes

In similar fashion to Infraco, the Agreement allows for the introduction of changes either by tie or Tramco always subject to notices and prescribed rules. tie may, subject to notice and terms, order additional trams with related spare parts and special tools.

Quality Assurance

Tramco shall at all times utilise a Project Quality Assurance Programme compliant to standards. A tram manufacturing and delivery programme is agreed and regular monitoring of progress will take place.

There is provision in the Agreement for tie to be involved in inspecting the trams at various stages of the manufacturing process. Tramco shall deliver the trams to the designated point of delivery at the depot and delivery tests shall be conducted. Tramco, tie and the operator shall agree a training programme and the detailed implementation.

Transfer of Title

Tramco shall provide Trams free from all security interests title to CEC on delivery or, in certain circumstances, at factory. Ownership earlier than this would expose CEC to not be able to reject a defective tram.

2.11 Tramco payment mechanism

Supply agreement

The payment mechanism under the supply contract conforms substantially to that under the Infraco contract as described above with the milestone payments heavily weighted towards:

- Initial mobilisation and establishment of supply chain
- Delivery of tram vehicles
- Attainment of performance and reliability standards as specified

2.12 Tramco performance security arrangements

Bonds during supply period

Tramco will provide a Reliability bond in the defined amount of 5% of the Tramco price such bond to be provided on or before the due date of delivery of the first Tram vehicle. A further advance payment bond is to be provided to tie.

Parent Company Guarantee (PCG)

The supply and maintenance contracts with Tramco are with the ultimate holding company so the issue of a PCG does not arise. The liability cap of Tramco under the tram supply agreement is 20% of the Tramco supply price.

Maintenance agreement

The Infraco is responsible for providing tram maintenance through Tramco performing the tram maintenance agreement. This is a relatively standard agreement, developed from UK sector models.

Performance securities under maintenance agreement

Tramco is required to provide a security at any time that there is determined by survey to be remedial work of a value greater than £50,000 required to reinstate the Tram assets to the Handback Condition,. This may either be in the form of a cash deposit or an on-demand Handback Bond covering the full value of the remedial work outstanding. The liability cap of the Tramco under the tram maintenance agreement is 18.5% of the aggregate 30 year Tram maintenance price.

CEC Financial Guarantee

CEC are required to provide a guarantee to the Infraco of the financial obligations (including future variations) of tie under the Infraco contract in recognition of the fact that tie on its own has no capacity to bear any financial commitment insofar as it is not 'back to back' with the funding of the project which is channelled through CEC. In this sense it is materially consistent with the provisions of the PCGs (including periods allowed for payment of amounts due) provided by the Infraco, except that it is a guarantee of financial obligations only and not of performance. The CEC Guarantee will be released upon issue of the ETN Reliability Certificate, that is to say approximately nine to twelve months after Service Commencement. Any pre-existing claims will survive release until settled.

The terms and conditions of the CEC Guarantee and in particular its call mechanics, liability cap and protections are in line with market practice for this type of instrument. It should be noted that the Guarantee may be called upon by the Infraco on multiple occasions if tie is in payment default more than once. The instrument has been drafted, negotiated and settled with direct involvement and support of CEC Legal and Finance.

The guarantee is provided to Infraco meaning either or both of Bilfinger & Berger UK Limited or Siemens PLC or their assignees as permitted and approved under the Infraco contract.

CEC will benefit from the same contractual defences and entitlements to set off as tie and will have no liability greater. No claim can be made for an amount which is in dispute if it has been referred to the dispute resolution.

The practical day-to-day implication of the Guarantee is that its provisions will not be invoked so long as the process for drawdown of cash from CEC to tie to meet payment obligations as they fall due is uninterrupted. Any dispute under the Guarantee would be subject to Scottish court proceedings.

Tie Limited
28th April 2008

EDINBURGH TRAM PROJECT ASSESSMENT OF RISK OF SUCCESSFUL PROCUREMENT CHALLENGE

Background

The Intention to Award notices were issued on 18th March and contract completion is imminent. The purpose of this paper is to summarise tie's assessment of the risk of a successful challenge under procurement regulations. Technically, a challenge could emerge from many quarters, but the most likely source in any procurement is from unsuccessful bidders, especially those who reached a late stage in the process. It is this threat which is addressed in this paper.

It must be borne in mind that the source and basis for a challenge cannot be predicted with certainty. This paper is not a substitute for the documentation that may be required to defend tie's actions in the event of a challenge.

The paper is supported by an Appendix containing detailed analysis of all aspects of the procurement process deployed and in particular the development of the final contract pricing. This Appendix has been prepared by Matthew Crosse who led the process for tie.

The Notification letters contained the information on the terms of award required to be provided under procurement regulations and debrief meetings have been requested by certain of the bidders.

The BBS consortium are in the process of finalising arrangements to include CAF in the consortium. In principle, tie is content that this should happen and indeed the concept was acknowledged at the time of preferred bidder selection, though with CAF Novation being the required approach to support Financial Close. tie and DLA are monitoring the BBS / CAF arrangements to ensure that no perception of a change in bid terms could be construed.

Analysis

Process employed

A review of the procurement process was performed by Jim McEwan which covered the period from selection of the preferred bidders in October 2007 through to the end of January 2008. This was independent of those who had been involved in the procurement process and concluded that the processes and documentation were in order. This review is included in the Close Report which supports the decision-making on Financial Close. Because the Close Report is potentially a public document, the more commercially confidential information contained in this paper will not be reflected in the Close Report.

Overall outcome

The current position was summarised for the Tram Project Board on 12th March 2008, which concluded that the outcome of the contractual negotiations was in line in all material respects with the Business Case which supported the selection of the Preferred Bidders in October 2007.

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There have been further amendments to the contractual terms since that date but tie does not believe these would be contentious in the view of a bidder. **In addition**, a challenger would have difficulty establishing prejudice because these amendments are the outcome of the process transparently declared in the ITN as part of post preferred bidder sessions. This does not of itself support a conclusion that principal Infraco / Tramco terms are materially unchanged. However, these contracts represent the core of the project and the majority of the funding. Compliance of the final position with the business case is therefore valid and influential background.

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Elapse of time

The considerable elapse of time since selection is an unhelpful factor as it is prima facie indicative of a lengthy period of post-selection negotiation. The reality has been that the delay and most of the effort since October 2007 has been caused by the difficulty of aligning the SDS provider with its novation responsibilities under their contract, coupled with the volume of work involved in the alignment of the SDS design with critical interface documents including the Employer's Requirements and the BBS Proposal. It is considered unlikely that selection of a different bidder would have reduced the time required to reach today's position. All bidders were on notice that SDS Novation was a prerequisite to completion. A draft Novation agreement was incorporated in the tender documents. Both bidders had quite significant commercial and contractual qualifications on their offers.

Price

In the period post the selection of preferred Infraco bidder, there has, as normal and expected, been movement in the commercial pricing of the contract based on a number of key drivers:

- Both parties in the preferred bidder review had lodged substantial and material qualifications to their bids and it was a key requirement in the ensuing months and prior to contract close that these were understood and resolved/removed, leading inevitably to change in contract terms.
- The substantial revision of the Employer's requirements, which are now at version **4.0** (Version 2.4 at conclusion of preferred bidder selection). These changes in requirements have been crystallised as both parties went through a process of harmonising and clarifying the requisite specifications. Included amongst these were the CEC's requirement for tapered poles in the heritage areas.
- Completion of further elements of the overall design which were not available at the time of the preferred bidder selection.
- Following the recognised changes to Employer Requirements and the completion and refinement of further aspects of the overall design, a review of the programme timescale has seen the programme move from delivery at the end of March 2011 to 16th July 2011 with concomitant effect on price.

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- Review of the Depot equipment base with the TRAMCO preferred bidder has seen a number of changes to said base to assure compliance.

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Whilst the BBS price has been increased, in a directly comparative situation, the BBS relative competitive position remains the same as at preferred position. This is because the primary reasons for the price shift are not bidder specific. The detailed analysis is shown in the Appendix. Clearly, all of the price adjustments negotiated by BBS are under very different circumstances to those prior to preferred bidder as BBS's negotiating position strengthens.

Programme

The programme to project completion has moved out by c3 months from the basis on which selection was made. The primary reason for this is the same as that described under elapse of time above, which affects the anticipated commencement of construction. The construction programme itself has not materially extended. It is considered that the delayed commencement and completion dates would have similarly arisen with alternative bidders.

Risk profile

It would be normal to expect that the risk profile will change as contracts are concluded, but only to a marginal degree. This is the case for the Infraco / Tramco contracts and risk profile. One specific area requires more detailed assessment – the risks arising from the overlap of design and construction.

This was anticipated at the time of bidder selection, but the detailed mechanics of dealing with the issue have been developed since selection. The issue of overlap would almost certainly have arisen in the same form with any bidder and it is believed that the solution would have been similarly concluded. This covers both the legal process and protections and the management processes.

Contract security terms

These terms could be relevant if any changes implied that the perceived risk were materially different from the basis of selection.

In substance the only material change in security terms between Preferred Bidder stage and the final negotiated deal is that the previous 30% liability cap during the construction phase (with no performance bond) on Infraco is now a 20% liability cap plus two separate on-demand bonds of a further c25% which is over and above the liability cap – therefore amounting to the same cover. There have been alterations to the duration and function of the liability cap post-construction, but within acceptable bounds. All security terms have been negotiated and have emerged broadly within the range of expected market terms. The bonding support is on balance more advantageous to tie / CEC than might have been anticipated. The PCG arrangements are stated in acceptable terms but are complex and it is recognised that any material claim on these instruments will not be a straight-forward process.

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Intimations

We have had no indications from any party that they are considering a challenge. Reaction to selection was normal although it should be noted that the losing bidder in Infracore has formally requested a de-brief and will take a close interest in the final terms of award, particularly final price, given the investment made in the bid process.

It is also worth noting that there may be a legal defect in the unsuccessful bidder's tender which would offer defensive material if a challenge is made, although this has been explained by the bidder as a reaction to the PB deal they were asked to sign being incomplete. The issue is that tie does not have a valid Tramlines' committed commercial proposal on the same comparative basis as Tramlines because Tramlines refused to sign the draft deal document at the point of selection of preferred bidder.

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DLA Letter

An accompanying letter from DLA provides their view of the content of this paper.

Conclusion

tie considers that the conduct of the procurement process and the management of contract completion since selection of preferred bidders have been in line with procurement regulation. Should a challenge be made, tie would be in a strong position to resist successfully. Accordingly, there should be no concern about contract award.

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tie Limited
28th April 2008

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DETAILED ANALYSIS OF THE PROCUREMENT PROCESS

APPENDIX 1

This appendix sets out important detailed information on the background, processes and movements since the preferred bidder award. It is intended to provide the basis to refute any challenge, though focussed on the possibility of a challenge by the losing Infracore bidder Tramlines.

1. Preferred Bidder Decision Basis

Preferred bidder appointment was made in October 2007.

The decision to select BBS over Tramlines was based on the agreed award criteria. In summary:

- **Price:** On a fully normalised CAPEX comparison, BBS were £7.6m (4%) lower than Tramlines. This delta increased to £10m (5%) on a PV comparison.
- **Programme and Project Execution:** Both bids were similarly matched and acceptable to tie. In respect of programme, Tramlines were penalised for the degree of overlap with the MUDFA programme. Efforts to close this gap were unsuccessful.
- **Legal and Commercial:** BBS proposal contained fewer mark ups and was generally in a more favourable position in respect of financial liability caps and latent defect periods. BBS showed a greater degree of flexibility and tractability compared to Tramlines.
- **Technical:** Both bidders were closely matched and were acceptable to tie. In view of its widespread application in Europe, BBS 'Sedra' trackform was generally preferred to Tramlines. BBS adopted a more competitive position in respect of NR immunisation which meant lower levels of residual risk for tie and a price reduction.
- **Maintenance:** Both proposals were similarly matched, but BBS was more competitive by some 16%. It was considered that BBS' overall approach arguably provided greater delivery certainty over Tramlines.

Both bidders negotiated a Draft Deal which consolidated their respective commercial and contractual positions and set out the basis for any future adjustments. Whilst BBS signed their agreement, Tramlines declined to sign. Importantly, this means that tie doesn't currently have a valid and confirmed Tramlines proposal against which we can compare.

2. Fixing the Price

Both bidders' civils' prices were based on the Preliminary Design prevailing at the time of the latter stages of the negotiated process. They were qualified accordingly with firm and provisional sums. The procurement strategy was based on re-measuring these price elements during the preferred bidder stage as designs were completed and prices adjusted at the declared rates from the Draft Deal.

After selection of BBS and the commencement of due diligence, a number of circumstances made it more difficult for BBS to firm up the provisional elements of their bid (structures, roads, pavings and drainage). These were:

- The SDS design was taking longer to be completed, and also being finished in a piecemeal fashion making it difficult to price.
- The design that was emerging contained a greater number of differences than anticipated at preliminary design stage (the BaFO datum). For example structures and tram stops.
- BBS were not sufficiently resourced to quickly turn the emerging designs into quantities and prices. Other activities on the programme such as VE and due diligence distracted the team from the core pricing requirements.

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The net affect of this was to frustrate tie's attempt to gain a greater 'fix' on the price and hence the budget in order to progress the FBC v2 approval with the Council and Transport Scotland. In response to this dilemma tie requested that BBS consider fixing their price.

Wiesbaden

Following protracted negotiations covering a range of contractual, technical and importantly commercial issues, BBS finally agreed to fix their price albeit with qualifications. This culminated in senior level negotiations in Wiesbaden and tie/BBS signing an agreement the following week (20 December 2007). In addition to fixing their price the deal also committed BBS to accepting a number of VE initiatives, again subject to a number of qualifications.

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3. Closing negotiations and adjustments

Following the FBC approval milestone in December, both parties have since worked strenuously to close out all remaining aspects of the contract suite. The work has been extensive and required good faith negotiations to:

1. Finalise the remaining Contract terms
2. Deal with the CAF novation alignment issues
3. Deal with the SDS novation alignment issues
4. Finalise the Employers Requirements
5. Consolidate the BBS proposal
6. Ensure alignment with the SDS design

BBS have increasingly hardened their negotiation game as tie have approached specific procurement milestone dates. This is not untypical for contractors in this phase as their bargaining power increases considerably. In each case tie have pushed back and been prepared to move a milestone in order to get a better deal for tie/CEC.

During this period BBS have continued to reappraise their commercial position as more and more knowledge becomes available. They have now completed their due diligence on all aspects of the project. This has included ascertaining the quality of SDS outputs and gaps, the reliability of the design programme and a review of the design work and resources going forward. This due diligence has informed their negotiating stance in all regards and has remained at the top of their 'deal breaker' list.

In summary, areas where BBS have needed to move their commercial position are:

- Systems resources: BBS (Siemens) have re-evaluated the level of resources they would need to fill any gaps within the scope to ensure successful completion. Prior to preferred bidder tie encouraged both BBS and Tramlines to reduce their engineering resources on the grounds that SDS were carrying out these activities.
- SDS civils design quality: This is seen as a significant risk to BBS which in their view, could cause delay costs whilst designs are reworked.
- CAF alignment: in contract negotiations both CAF and BBS expressed concern that commercial alignment between the two contracts placed them both at risk. To the extent possible, these misalignments were remedied in each contract. However, some unforeseen alignment risks remained. BBS insisted on pricing the typical time impact of such risks as well covering with contingency sums which was negotiated done.
- Programme: This has moved 3 months, largely reflecting a longer than forecast close programme (+2 months) and the need to have complete acceptance by BBS, CAF, SDS and CEC of the design construction master programme.
- ER changes. Reasons include assumed VE changes that are now unacceptable, the Council's preference on equipment specifications (e.g. tapered poles) and the need for pricing of previously excluded items (e.g. Scottish Power breakers). In virtually every case Tramlines would have needed to revise their price in the same way that BBS have done.

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4. Comparison between Preferred Bidder and Close position

Table 1 provides a summary comparison of BBS competitive position at time of preferred bidder with their position at today. It also indicates a hypothetical position from Tramlines based on the discussion above.

5. Conclusions from the detailed analysis in this Appendix

The evaluation decision at preferred bidder remains robust. Tramlines have few grounds for challenging the decision and the current financial close outcome. If they chose to do so, the arguments and adjudication would be complex, lengthy and in some cases subjective.

Whilst the BBS price has been increased, in a directly comparative situation, the BBS relative competitive position remains the same as at preferred position. This is because the primary reasons for the price shift are not bidder specific: the SDS design emerging with a higher specification and cost than at preliminary design (the BaFo price datum); the SDS due diligence findings including design quality, systems resources, gaps etc; contractual alignment issues with CAF; the time taken to close out the complex contract and novation process; and the many ER/ VE related changes. In virtually every case, Tramlines would have needed to increase their price on broadly the same basis as BBS.

In respect of the technical changes, the preferred bidder situation remains materially unaltered.

Contractually, there have been small movements which have may have arguably bought BBS and Tramlines closer together, but overall, the comparative situation remains similar. The principal contract changes in BBS position, relate to consents and approvals where tie/CEC are now accepting more risk. Here tie is confident Tramlines would have adopted a similar negotiating stance because they were similarly qualified at the time of preferred bidder.

Clearly, all of the recent price adjustments by BBS are under very different circumstances to those prior to preferred bidder. The closer tie get to financial close, the more difficult and costly it becomes for tie to revert to Tramlines. BBS are using this vast reduction in competitive pressure to their commercial advantage. Would Tramlines have been less aggressive, or priced changes more economically? The procurement team strongly believe that they would not. Indeed BBS' 'new entrant' position in the market suggests that relative to Tramlines they would be tactically more cautious, since a high profile failure at this stage would create large repercussions in the market. This would damage future prospects for BBS' target order book.

Today, tie does not have a valid Tramlines' committed commercial proposal on the same comparative basis as Tramlines. If they were today asked to sign the draft deal, there is no reason to suggest that the terms or price wouldn't increase reflecting the change in commercial circumstances.

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Table 1 Summary comparison of BBS competitive position at time of preferred bidder with their position at today

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	Brunel Price changes			
	ER's compliance	1.4	Mostly tie changes which were unagreed at preferred bidder.	No
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Key BBS Differentiator	BBS Summary Shifts to Close	Impact	Hypothetical Tramlines Position	Challenge risk?
<p>Programme and Project Execution</p> <p>BBS Programme worked with few MUDFA clashes</p>	Programme shift + 3 months	+ 3 months	Position could worsen because their proposal was poorer to start with. See comments above too.	No
<p>Maintenance</p> <p>Price was ~16% lower</p>	Price	Nil	No shift	No
<p>Technical</p> <p>Trackform preferred</p> <p>NR Immunisation risks</p>	<p>Rheda City now proposed (c.f Sedra)</p> <p>Some attempt to shift position from that at PB</p>	<p>Nil</p> <p>3m</p>	<p>No price impact. Tie still regard this as a more reliable Trackform than Tramlines proposal</p> <p>Tramlines were considerably less competitive and would have been unlikely to have moved to the BBS position without greater competitive pressure.</p>	<p>No</p> <p>Possible</p>
<p>Legal & Commercial</p>	<p>Attitude – has hardened as procurement milestones are approached.</p> <p>Defect liability periods now reduced from 20 years.</p> <p>Consents changes/relations (partial risk shift to tie)</p>	<p>Nil</p> <p>12yrs</p>	<p>Tramlines would have no doubt played a harder game as these same deadlines approach.</p> <p>Tramlines offered a qualified 15 years considerably less competitive at the time and would have been unlikely to have moved to the BBS position without greater competitive pressure.</p> <p>Consent was also qualified by Tramlines. Unlikely tie would end up in a better position with Tramlines.</p>	<p>No</p> <p>Possible</p> <p>No</p>

EDINBURGH TRAM PROJECT

ASSESSMENT OF RISK OF SUCCESSFUL PROCUREMENT CHALLENGE

Background

The Intention to Award notices were issued on 18th March and contract completion is imminent. The purpose of this paper is to summarise tie's assessment of the risk of a successful challenge under procurement regulations. Technically, a challenge could emerge from many quarters, but the most likely source in any procurement is from unsuccessful bidders, especially those who reached a late stage in the process. It is this threat which is addressed in this paper.

It must be borne in mind that the source and basis for a challenge cannot be predicted with certainty. This paper is not a substitute for the documentation that may be required to defend tie's actions in the event of a challenge.

The paper is supported by an Appendix containing detailed analysis of all aspects of the procurement process deployed and in particular the development of the final contract pricing. This Appendix has been prepared by Matthew Crosse who led the process for tie.

The Notification letters contained the information on the terms of award required to be provided under procurement regulations and debrief meetings have been requested by certain of the bidders.

The BBS consortium are in the process of finalising arrangements to include CAF in the consortium. In principle, tie is content that this should happen and indeed the concept was acknowledged at the time of preferred bidder selection, though with CAF Novation being the required approach to support Financial Close. tie and DLA are monitoring the BBS / CAF arrangements to ensure that no perception of a change in bid terms could be construed.

Analysis

Process employed

A review of the procurement process was performed by Jim McEwan which covered the period from selection of the preferred bidders in October 2007 through to the end of January 2008. This was independent of those who had been involved in the procurement process and concluded that the processes and documentation were in order. This review is included in the Close Report which supports the decision-making on Financial Close. Because the Close Report is potentially a public document, the more commercially confidential information contained in this paper will not be reflected in the Close Report.

Overall outcome

The current position was summarised for the Tram Project Board on 12th March 2008, which concluded that the outcome of the contractual negotiations was in line in all material respects with the Business Case which supported the selection of the Preferred Bidders in October 2007.

There have been further amendments to the contractual terms since that date but tie does not believe these would be contentious in the view of a bidder. In addition, a challenger would have difficulty establishing prejudice because these amendments are the outcome of the process transparently declared in the ITN as part of post preferred bidder sessions. This does not of itself support a conclusion that principal Infracore / Tramco terms are materially unchanged. However, these contracts represent the core of the project and the majority of the funding. Compliance of the final position with the business case is therefore valid and influential background.

Elapse of time

The considerable elapse of time since selection is an unhelpful factor as it is prima facie indicative of a lengthy period of post-selection negotiation. The reality has been that the delay and most of the effort since October 2007 has been caused by the difficulty of aligning the SDS provider with its novation responsibilities under their contract, coupled with the volume of work involved in the alignment of the SDS design with critical interface documents including the Employer's Requirements and the BBS Proposal. It is considered unlikely that selection of a different bidder would have reduced the time required to reach today's position. All bidders were on notice that SDS Novation was a prerequisite to completion. A draft Novation agreement was incorporated in the tender documents. Both bidders had quite significant commercial and contractual qualifications on their offers.

Price

In the period post the selection of preferred Infracore bidder, there has, as normal and expected, been movement in the commercial pricing of the contract based on a number of key drivers:

- Both parties in the preferred bidder review had lodged substantial and material qualifications to their bids and it was a key requirement in the ensuing months and prior to contract close that these were understood and resolved/removed, leading inevitably to change in contract terms.
- The substantial revision of the Employer's requirements, which are now at version 4.0 (Version 2.4 at conclusion of preferred bidder selection). These changes in requirements have been crystallised as both parties went through a process of harmonising and clarifying the requisite specifications. Included amongst these were the CEC's requirement for tapered poles in the heritage areas.
- Completion of further elements of the overall design which were not available at the time of the preferred bidder selection.
- Following the recognised changes to Employer Requirements and the completion and refinement of further aspects of the overall design, a review of the programme timescale has seen the programme move from delivery at the end of March 2011 to 16th July 2011 with concomitant effect on price.

- Review of the Depot equipment base with the TRAMCO preferred bidder has seen a number of changes to said base to assure compliance.

Whilst the BBS price has been increased, in a directly comparative situation, the BBS relative competitive position remains the same as at preferred position. This is because the primary reasons for the price shift are not bidder specific. The detailed analysis is shown in the Appendix. Clearly, all of the price adjustments negotiated by BBS are under very different circumstances to those prior to preferred bidder as BBS's negotiating position strengthens.

Programme

The programme to project completion has moved out by c3 months from the basis on which selection was made. The primary reason for this is the same as that described under elapse of time above, which affects the anticipated commencement of construction. The construction programme itself has not materially extended. It is considered that the delayed commencement and completion dates would have similarly arisen with alternative bidders.

Risk profile

It would be normal to expect that the risk profile will change as contracts are concluded, but only to a marginal degree. This is the case for the Infraco / Tramco contracts and risk profile. One specific area requires more detailed assessment – the risks arising from the overlap of design and construction.

This was anticipated at the time of bidder selection, but the detailed mechanics of dealing with the issue have been developed since selection. The issue of overlap would almost certainly have arisen in the same form with any bidder and it is believed that the solution would have been similarly concluded. This covers both the legal process and protections and the management processes.

Contract security terms

These terms could be relevant if any changes implied that the perceived risk were materially different from the basis of selection.

In substance the only material change in security terms between Preferred Bidder stage and the final negotiated deal is that the previous 30% liability cap during the construction phase (with no performance bond) on Infraco is now a 20% liability cap plus two separate on-demand bonds of a further c25% which is over and above the liability cap – therefore amounting to the same cover. There have been alterations to the duration and function of the liability cap post-construction, but within acceptable bounds. All security terms have been negotiated and have emerged broadly within the range of expected market terms. The bonding support is on balance more advantageous to tie / CEC than might have been anticipated. The PCG arrangements are stated in acceptable terms but are complex and it is recognised that any material claim on these instruments will not be a straight-forward process.

Intimations

We have had no indications from any party that they are considering a challenge. Reaction to selection was normal although it should be noted that the losing bidder in Infracore has formally requested a de-brief and will take a close interest in the final terms of award, particularly final price, given the investment made in the bid process.

It is also worth noting that there may be a legal defect in the unsuccessful bidder's tender which would offer defensive material if a challenge is made although this has been explained by the bidder as a reaction to the PB deal they were asked to sign being incomplete. The issue is that tie does not have a valid Tramlines' committed commercial proposal on the same comparative basis as Tramlines because Tramlines refused to sign the draft deal document at the point of selection of preferred bidder.

DLA Letter

An accompanying letter from DLA provides their view of the content of this paper.

Conclusion

tie considers that the conduct of the procurement process and the management of contract completion since selection of preferred bidders have been in line with procurement regulation. Should a challenge be made, tie would be in a strong position to resist successfully. Accordingly, there should be no concern about contract award.

tie Limited
28th April 2008

This appendix sets out important detailed information on the background, processes and movements since the preferred bidder award. It is intended to provide the basis to refute any challenge, though focussed on the possibility of a challenge by the losing Infracore bidder Tramlines.

1. Preferred Bidder Decision Basis

Preferred bidder appointment was made in October 2007.

The decision to select BBS over Tramlines was based on the agreed award criteria. In summary:

- **Price:** On a fully normalised CAPEX comparison, BBS were £7.6m (4%) lower than Tramlines. This delta increased to £10m (5%) on a PV comparison.
- **Programme and Project Execution:** Both bids were similarly matched and acceptable to tie. In respect of programme, Tramlines were penalised for the degree of overlap with the MUDFA programme. Efforts to close this gap were unsuccessful.
- **Legal and Commercial:** BBS proposal contained fewer mark ups and was generally in a more favourable position in respect of financial liability caps and latent defect periods. BBS showed a greater degree of flexibility and tractability compared to Tramlines.
- **Technical:** Both bidders were closely matched and were acceptable to tie. In view of its widespread application in Europe, BBS 'Sedra' trackform was generally preferred to Tramlines. BBS adopted a more competitive position in respect of NR immunisation which meant lower levels of residual risk for tie and a price reduction.
- **Maintenance:** Both proposals were similarly matched, but BBS was more competitive by some 16%. It was considered that BBS' overall approach arguably provided greater delivery certainty over Tramlines.

Both bidders negotiated a Draft Deal which consolidated their respective commercial and contractual positions and set out the basis for any future adjustments. Whilst BBS signed their agreement, Tramlines declined to sign. Importantly, this means that tie doesn't currently have a valid and confirmed Tramlines proposal against which we can compare.

2. Fixing the Price

Both bidders' civils' prices were based on the Preliminary Design prevailing at the time of the latter stages of the negotiated process. They were qualified accordingly with firm and provisional sums. The procurement strategy was based on re-measuring these price elements during the preferred bidder stage as designs were completed and prices adjusted at the declared rates from the Draft Deal.

After selection of BBS and the commencement of due diligence, a number of circumstances made it more difficult for BBS to firm up the provisional elements of their bid (structures, roads, pavings and drainage). These were:

- The SDS design was taking longer to be completed, and also being finished in a piecemeal fashion making it difficult to price.
- The design that was emerging contained a greater number of differences than anticipated at preliminary design stage (the BaFO datum). For example structures and tram stops.
- BBS were not sufficiently resourced to quickly turn the emerging designs into quantities and prices. Other activities on the programme such as VE and due diligence distracted the team from the core pricing requirements.

The net affect of this was to frustrate tie's attempt to gain a greater 'fix' on the price and hence the budget in order to progress the FBC v2 approval with the Council and Transport Scotland. In response to this dilemma tie requested that BBS consider fixing their price.

Wiesbaden

Following protracted negotiations covering a range of contractual, technical and importantly commercial issues, BBS finally agreed to fix their price albeit with qualifications. This culminated in senior level negotiations in Wiesbaden and tie/BBS signing an agreement the following week (20 December 2007). In addition to fixing their price the deal also committed BBS to accepting a number of VE initiatives, again subject to a number of qualifications.

3. Closing negotiations and adjustments

Following the FBC approval milestone in December, both parties have since worked strenuously to close out all remaining aspects of the contract suite. The work has been extensive and required good faith negotiations to:

1. Finalise the remaining Contract terms
2. Deal with the CAF novation alignment issues
3. Deal with the SDS novation alignment issues
4. Finalise the Employers Requirements
5. Consolidate the BBS proposal
6. Ensure alignment with the SDS design

BBS have increasingly hardened their negotiation game as tie have approached specific procurement milestone dates. This is not untypical for contractors in this phase as their bargaining power increases considerably. In each case tie have pushed back and been prepared to move a milestone in order to get a better deal for tie/CEC.

During this period BBS have continued to reappraise their commercial position as more and more knowledge becomes available. They have now completed their due diligence on all aspects of the project. This has included ascertaining the quality of SDS outputs and gaps, the reliability of the design programme and a review of the design work and resources going forward. This due diligence has informed their negotiating stance in all regards and has remained at the top of their 'deal breaker' list.

In summary, areas where BBS have needed to move their commercial position are:

- **Systems resources:** BBS (Siemens) have re-evaluated the level of resources they would need to fill any gaps within the scope to ensure successful completion. Prior to preferred bidder tie encouraged both BBS and Tramlines to reduce their engineering resources on the grounds that SDS were carrying out these activities.
- **SDS civils design quality:** This is seen as a significant risk to BBS which in their view, could cause delay costs whilst designs are reworked.
- **CAF alignment:** in contract negotiations both CAF and BBS expressed concern that commercial alignment between the two contracts placed them both at risk. To the extent possible, these misalignments were remedied in each contract. However, some unforeseen alignment risks remained. BBS insisted on pricing the typical time impact of such risks as well covering with contingency sums which was negotiated done.
- **Programme:** This has moved 3 months, largely reflecting a longer than forecast close programme (+2 months) and the need to have complete acceptance by BBS, CAF, SDS and CEC of the design construction master programme.
- **ER changes.** Reasons include assumed VE changes that are now unacceptable, the Council's preference on equipment specifications (e.g. tapered poles) and the need for pricing of previously excluded items (e.g. Scottish Power breakers). In virtually every case Tramlines would have needed to revise their price in the same way that BBS have done.

4. Comparison between Preferred Bidder and Close position

Table 1 provides a summary comparison of BBS competitive position at time of preferred bidder with their position at today. It also indicates a hypothetical position from Tramlines based on the discussion above.

5. Conclusions from the detailed analysis in this Appendix

The evaluation decision at preferred bidder remains robust. Tramlines have few grounds for challenging the decision and the current financial close outcome. If they chose to do so, the arguments and adjudication would be complex, lengthy and in some cases subjective.

Whilst the BBS price has been increased, in a directly comparative situation, the BBS relative competitive position remains the same as at preferred position. This is because the primary reasons for the price shift are not bidder specific: the SDS design emerging with a higher specification and cost than at preliminary design (the BaFo price datum); the SDS due diligence findings including design quality, systems resources, gaps etc; contractual alignment issues with CAF; the time taken to close out the complex contract and novation process; and the many ER/ VE related changes. In virtually every case, Tramlines would have needed to increase their price on broadly the same basis as BBS.

In respect of the technical changes, the preferred bidder situation remains materially unaltered.

Contractually, there have been small movements which have may have arguably bought BBS and Tramlines closer together, but overall, the comparative situation remains similar. The principal contract changes in BBS position, relate to consents and approvals where tie/CEC are now accepting more risk. Here tie is confident Tramlines would have adopted a similar negotiating stance because they were similarly qualified at the time of preferred bidder.

Clearly, all of the recent price adjustments by BBS are under very different circumstances to those prior to preferred bidder. The closer tie get to financial close, the more difficult and costly it becomes for tie to revert to Tramlines. BBS are using this vast reduction in competitive pressure to their commercial advantage. Would Tramlines have been less aggressive, or priced changes more economically? The procurement team strongly believe that they would not. Indeed BBS' 'new entrant' position in the market suggests that relative to Tramlines they would be tactically more cautious, since a high profile failure at this stage would create large repercussions in the market. This would damage future prospects for BBS' target order book.

Today, tie does not have a valid Tramlines' committed commercial proposal on the same comparative basis as Tramlines. If they were today asked to sign the draft deal, there is no reason to suggest that the terms or price wouldn't increase reflecting the change in commercial circumstances.

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12 March 2008

Dear Ms Lindsay,

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

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

PROGRAMME

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

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

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

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INVESTOR IN PEOPLE

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

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

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

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

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