

Edinburgh Tram Contracts Acceptance

The City of Edinburgh Council

20 December 2007

1 Purpose of report

- 1.1 Recommending approval of the Final Business Case version 2 (FBCv2) prepared by **tie** for the Edinburgh Tram Network.
- 1.2 Recommending staged approval for the award by **tie** of the contracts for the supply and maintenance of the infrastructure works (Infraco) and tram vehicles (Tramco) subject to price and terms being consistent with the Final Business Case, and subject to the Chief Executive being satisfied that all remaining due diligence is resolved to his satisfaction
- 1.3 Recommending approval of the governance arrangements of the Tram through completion of the above contracts, commissioning and commencement of integrated transport operations.

2 Summary

- 2.1 A detailed report recommending approval of the Tram Final Business Case version 1 was presented to Council on 25 October this year. The FBCv2 is materially unchanged from the FBCv1 approved in October in respect of scope, programme, and estimated capital cost. This current report summarises progress over the last two months drawing particular attention to developments and issues associated with project risks, project funding and governance arrangements.

3 Main Report

Recent Developments

- 3.1 Detailed negotiations between **tie** and the preferred Infraco contractor, Bilfinger Berger and Siemens (BBS), and the preferred Tramco contractor CAF have progressed satisfactorily with a programmed financial close on 28 January 2008. Negotiations have focussed on the following issues:
 - Novation of Tramco and SDS contracts to Infraco.
 - Design Matters
 - Price and Risk allocation
 - Construction Programme
- 3.2 The cost estimates for the project reflect provision for evolution as the detailed design will be completed in the coming months. The design is completed under

the Infraco contract from the point of award of that contract through novation of the System Design Services contract with Parsons Brinkerhoff to Infraco.

4 Project Governance

Tram Project Board (TPB)

- 4.1 On 23 August 2007 the Chief Executive reported to Council that the role of the TPB required to be formalised. This report addresses the issues described in August and formally delegates certain powers to the TPB. Appendix 1 illustrates the governance arrangements.
- 4.2 It is proposed that the TPB be formally constituted as a committee of TEL and the Council would therefore delegate powers in the first instance to TEL. Council requires to delegate authority to TEL in terms of recommendation 10.8 in this report and this delegation will be regulated by an Operating Agreement, which is currently being prepared and will be agreed by the Council Solicitor and the TEL Board before Financial Close. There will require to be a seamless delegation of authority from the Council through TEL to TPB to ensure proper governance and accountability and the efficient delivery of the project. For that to be completed TEL will need to take a decision at board level resolving to further delegate its powers from the Council on to TPB.
- 4.3 Council is also asked to confirm the nomination of the Director of City Development and the Director of Finance to represent the Council on the TPB.
- 4.4 To further ensure that all aspects of governance are in place Council is asked to authorise through **tie** that this company also has a firm delegation of appropriate powers to engage with the TPB.
- 4.5 The **tie** operating agreement has been agreed subject to formal approval by the next **tie** board and the final draft is included as Appendix 2 of this report. The final version will formally be agreed by the Council Solicitor.

Tram Monitoring Officer

- 4.6 The Operating Agreements with **tie** and TEL envisage a "Tram Monitoring Officer ", described as a Council officer nominated by the Council to monitor the Company in relation to the Tram Project. A variety of controls will be vested in this officer by virtue of the Operating Agreement. Council is asked to designate The Director of City Development (or nominee) as the Monitoring Officer.

Tram Sub Committee

- 4.7 Clarity requires to be established on a number of other issues concerning governance. Council has previously considered the remit of the Tram Sub-Committee of the Transport, Infrastructure and Environment Committee, and this report now brings forward greater definition of that remit.
- 4.8 Some issues will require to be referred to Council, together with the approval of the annual business plans for **tie** and TEL respectively. Any significant changes to Council obligations including material changes to scope and cost, within the Tram Project, will also be reserved to Council.
- 4.9 All other Tram matters, other than those being dealt with by TPB, will be referred to the Tram Sub-Committee, together with the general discretion to decide when matters are referred to its parent Committee or to Council.
- 4.10 The range of matters within the remit of the Tram Sub-Committee will include the following, all as previously approved by Council or through this report.
- Receive monthly progress report from TPB
 - Significant changes to the Infraco and Mudfa contracts
 - Settlement of any financial claims that might arise against **tie**/the Council, subject to ratification by the Full Council for amounts in excess of £500,000
 - Financial statements: monthly/annual and borrowings (including Section 75 Developers Contributions)
 - Risk Register updates
 - Traffic Regulation Orders and Traffic Management Issues
 - Operating Issues
 - Changes to governance with **tie** and TEL Boards.
 - Third Party Agreement issues.
 - Notification of disputes
 - Roads Demarcation Agreement: (approval of the division of responsibilities between the Council and TEL)
 - Updates on Audit and third party reviews
 - Other non-delegated matters arising

- Marketing and Public Relations Strategy (including livery and interior of tram)

5 The Final Business Case

- 5.1 FBCv2 is included as a background paper to this report and reflects no material changes since FBCv1 in respect of:
- Scope and functionality of the project
 - Overall programme which still reflects tram operations commencing in 2011 for revenue services
 - Risks retained by the public sector
 - Estimated capital costs which remain consistent with the final business case for Phase 1a (Airport to Newhaven) and for Phase 1b (Roseburn to Granton) inclusive of allowance for risks retained by the public sector.
 - Funding currently available for the project of £545m comprising up to £500m from the Scottish Government and £45m from CEC
 - It should be noted that the FBCv2 Governance provisions now align with those set out in this report
- 5.2 The FBCv2 repeats its recommendation of proceeding initially with Phase 1a within the funding of £545m committed to the project. Funding available from the Scottish Government will be 91.7% of the total cost and capped at £500m (excluding the costs of the new Gogar Station to serve Edinburgh Airport).

6 Bikes on Trams

- 6.1 The preferred bidder for vehicle supply will be asked to investigate, as part of the tram internal design finalisation, whether potential capacity for safe cycle carriage is possible. This will be reported in due course to the tram sub-committee.

7 Gogar Station

- 7.1 The Government announced to Parliament on the 27th of September 2007, support for a managed programme of change, providing a more efficient and greener rail network across Central Scotland, delivering faster journey times, increased capacity and services.
- 7.2 Part of that programme is the provision of a new railway station, at Gogar, designed and positioned to integrate with the Edinburgh tram, allowing airport passengers to interchange between heavy rail and tram for onward travel to Edinburgh airport and vice versa. Due to the close alignment of the tram route and the heavy rail Fife line in the Gogar area it is thought that this is the most practical place for a new station to be constructed.
- 7.3 Transport Scotland is responsible for the delivery of the new station and the work is progressing well. **tie** have provided appropriate access to sketches and plans and a visit to the tram depot site has been arranged. Given the many design options for the new station and the method of interchange with the tram, a consultant will be appointed by Transport Scotland to present feasible options for selection. While connection to the tram is a crucial element in the design brief, a critical success factor in selection of a single option will be that any

impact upon the Edinburgh tram is minimised. Any additional costs associated with the provision of the station will be borne by Transport Scotland and will not form part of the £500m grant funding for Edinburgh Tram.

- 7.4 The timescale for completion of the new station and link to the tram is for it to be open at the same time as the tram in the 1st quarter of 2011.

8 Financial Implications

- 8.1 The report to Council in October 2007 provided a detailed financial analysis of the Final Business Case, based on the design work completed at that time and upon the firm bids received for tram vehicles and infrastructure. Some cost allowance has been made for the risk associated with the detailed design work not being completed, at the time of financial close. This section reflects upon the financial implications and risks associated with the project in the context of the close out of the Infraco contract with BBS, the Infraco preferred bidder, and the design and value engineering work carried out since October.

Capital Costs

- 8.2 The Final Business Case aggregate estimate of £498m for Phase 1a inclusive of a risk allowance as reported in October 2007 remains valid. The estimated costs for Phase 1b are £87m. The current price estimate is based on a compressed construction programme designed to reduce the time spent on the on-street works and minimise disruption to stakeholders. The cost estimate and risk allowance have been reviewed to take account of the latest negotiated position and the estimates provided in October 2007 remain valid.

Funding

- 8.3 The available funding for the project remains at £545m. £45m of this sum has been committed by the City of Edinburgh Council with the remaining £500m as grant funding from Transport Scotland. The terms of the grant award have been agreed in principle with officials from Transport Scotland. The award letter will confirm the annual sums that will be provided by Transport Scotland. The Director of Finance will be authorised to execute the Grant Award agreement at or prior to Financial Close.
- 8.4 The funding percentage has been agreed at 91.7% Transport Scotland and 8.3% City of Edinburgh Council. Transport Scotland have set yearly limits on the amount of grant available and discussions are ongoing with Transport Scotland to facilitate acceleration or slippage of spending where it is commercially advantageous.
- 8.5 It should be noted that an independent assessment has been made on the Council's £45m contribution by DTZ Pineda following the Council decision of 25th October 2007. This independent assessment confirms the scale of contributions that can be expected. Their report states "*that the Council's tram funding strategy is realistic, based on sound assumptions and achievable within the timescales*". The findings are subject to a separate report within the agenda of the Full Council.
- 8.6 The revised Tram Developer Contribution Guideline was due to be considered by Planning Committee on the 19th December 2007. This will allow the Council to borrow against future developers contributions towards the tram beyond the completion of the tram project.

CEC Guarantee and Delegation of Authority

- 8.7 It is necessary to show how tie is enabled by the Council to enter into the contracts with BBS and Construcciones y Auxiliar de Ferrocarriles SA (CAF). Council obtained the relevant powers to construct, maintain and operate the Tram by virtue of Edinburgh Tram (Line One) Act 2006 and Edinburgh Tram (Line Two) Act 2006. The Council is designated as “authorised undertaker” in these Acts. It is provided that the Council as authorised undertaker “may enter into and carry into effect agreements with respect to all or any part or parts of the authorised works concerning construction, maintenance, use and operation, by any other person.”
- 8.8 In order to facilitate the conclusion of the Infraco and Tramco contracts by tie it will be necessary for the Council to exercise its powers under the respective Tram Acts by agreeing to tie exercising the following powers of the authorised undertaker, namely:-
- To enter into and manage a contract for the design, construction, testing, commissioning and maintenance of the Edinburgh Tram Network with Bilfinger Berger UK Ltd and Siemens plc
 - To enter into tram vehicle supply and maintenance contracts with CAF and to novate these contracts to the Infraco at the time of execution of the Infraco Contract
 - To novate the design contract dated 19th September 2005 between tie Limited and Parsons Brinkerhoff to the Infraco Contractor, in accordance with its terms
- 8.9 tie is to act as the Council’s agent under the general terms of the New Roads and Street Works Act 1991 (NRSWA) and relevant regulations so as enable financial contributions to be collected from the relevant utility companies and remitted to the Council.
- 8.10 The fundamental approach to the Tram contracts has been to transfer risk to the private sector. This has largely been achieved. The Council sits behind tie and ultimately carries all contractual responsibilities and is responsible for contract payments. A Draft Guarantee Agreement between the City of Edinburgh Council and the Infraco contractor BBS is being negotiated by the Council Solicitor and, with the approval of the Council, will be required to be executed on behalf of the Council before the Infraco contractor will agree to sign the Infraco contract. This agreement commits the Council to underwriting in full the payment obligations and financial liabilities which will be assumed by tie, pursuant to the executed Infraco contract. The Council through tie will benefit from parent company guarantees and performance bonds from BBS. These matters are covered by recommendations at paragraph 10.10 and in Appendix 3).

Risks

Public Sector Risks

- 8.11 Consistent with a project of this size and complexity, there are many different strands of work to be drawn together in the lead up to the conclusion of the main contract between tie, BBS and CAF. Progress in negotiation with the preferred bidder has been very positive. Council officers have been working with tie to close out as many of these work streams as possible, prior to seeking Council approval at this meeting. A number of on going matters should be

drawn to the attention of Council; these are set out below. Work will continue between now and financial close to ensure an acceptable outcome for the Council.

- 8.12 It is proposed that the Chief Executive ultimately, with delegated authority from Council, will determine when it is appropriate to permit **tie** to sign the contracts. The Chief Executive will be supported in that final part of the approval process by the Directors of City Development and Finance respectively, together with the Council Solicitor. A mandate will be given to **tie** when it is deemed that the relevant aspects of due diligence have been completed by **tie**. Only then will the Council become contractually committed through execution of the Guarantee supporting **tie's** financial obligations to BBS.
- 8.13 Risks retained by the public sector and which therefore bear upon the Council are explained in the Final Business Case section 11. These risks include:
- Agreements with third parties including delays to utility diversions
 - Finalisation of technical and prior approvals.
 - The market cannot provide Professional Indemnity Insurance to **tie** vis-à-vis a claim by the Council against **tie**, because **tie** is wholly owned by the Council.
- 8.14 Negotiations are ongoing to secure details of access to railway property with Network Rail and First Scotrail. It is anticipated this is resolved in a satisfactory manner prior to Financial Close. The Council has secured land necessary to construct the tram. The Council requires authority to lease or licence Council land for construction, testing and operation, initially to be to **tie** and then transferred to TEL. Additionally the Council requires to cover the lease of the depot car park and provide servitudes for Network Rail over CEC land.
- 8.15 There are additional risks such as third party agreements and consents where discussions and negotiations are continuing to reach an acceptable position in respect of allocation of risks.
- 8.16 The risk contingency does not cover major changes to scope. It should be noted that the current construction programme is compressed to reduce the length of disruption and provide best value. Changes to the programme could involve significant costs, not currently allowed for in the risk contingency.
- 8.17 It should be noted a substantial risk contingency is included on the estimate of Phase 1a. There is currently further headroom of £47m between the cost of Phase 1a and total available funding of £545m.
- 8.18 There are additional scope elements that will be separately funded. For example there is a funding package as part of the Leith Townscape initiative that will allow concurrent streetscape work on part of Bernard Street. Works on St. Andrew Square are funded from SEEL and Cities Growth Fund sources. There are also opportunities to address outstanding maintenance issues on Leith Walk footways. Remedial works have been held in abeyance to avoid abortive works, but can now be programmed to take place in parallel in the adjoining tram works. This will ensure the whole of Leith Walk can be comprehensively treated.

Next Steps

8.19 The table below summarises the expected milestone events in the final stages of the procurement and construction of the Edinburgh Tram Network.

Date	Milestone
11 th January 2008	Notification of Award
28 th January 2008	Tramco/Infraco contracts awarded
February 2008	Construction commences - phase 1a.
31 st March 2009	Latest decision to instruct <i>tie</i> /BBS to commence 1b
August 2010	Commencement of test running - phase 1a.
Q1 2011	Operations commence

9 Conclusions

- 9.1 Focussed contractual negotiations with the preferred bidders for Infraco and Tramco have been progressed by **tie**.
- 9.2 The preferred bidder negotiations, in terms of price, scope, design, and risk apportionment, give further assurance that Phase 1a can be completed within the available funding and are consistent with the Final Business Case.
- 9.3 The total forecast project cost is consistent with the final business case. **tie** is confident that risk contingencies and the final approved design can be accommodated within the funding available.
- 9.4 A decision on whether to proceed with Phase 1b, within the Infraco contract, can be made at any time until March 2009.

10 Recommendations

- 10.1 To approve the Final Business Case version 2.
- 10.2 To authorise the Chief Executive to instruct **tie** to enter into contracts with the Infraco bidder (BBS) and Tramco bidder CAF, providing the remaining issues are resolved to the satisfaction of the Chief Executive as detailed in this report.
- 10.3 To delegate to the Chief Executive authority to exercise the role in terms of 10.2 above.
- 10.4 To authorise the Director of City Development to grant leases or licences, as required, to facilitate the construction and operation of the tram.
- 10.5 To note that the formal award of these contracts is programmed to take place in January 2008 and will be notified to Council on 7th February 2008.
- 10.6 Approve the issue of the Guarantee and to delegate authority to the Council Solicitor to conclude and execute this on behalf of the Council for the benefit of BBS.

10.7 To note that the terms of the Draft Grant Award have been agreed in principle and to delegate authority to the Director of Finance to execute this on behalf of the Council

10.8 To approve;

- (i) The governance structure (Appendix 1) and
- (ii) The draft **tie** Operating Agreement (Appendix 2) and to delegate authority to the Council Solicitor to execute the Operating Agreements with **tie** and TEL on behalf of the Council and
- (iii) To delegate general authority to the Tram Project Board through TEL and **tie** and
- (iv) To nominate the Director of City Development and Director of Finance to the Tram Project Board.

10.9 To note the schedule of milestones presented at paragraph 8.19 above

10.10 Subject to satisfaction of recommendation 10.2 to approve the resolutions contained in Appendix 3.

10.11 To note **tie** is to act as agent for the Council under NRSWA 1991 for the purposes described at 8.9.

10.12 To note that the Chief Executive will report back to Council on 7 February 2008 on the outcome of the above.


Donald McGougan
Director of Finance

17th December 2007.


Andrew Holmes
Director of City Development

17.12.07.

Appendices

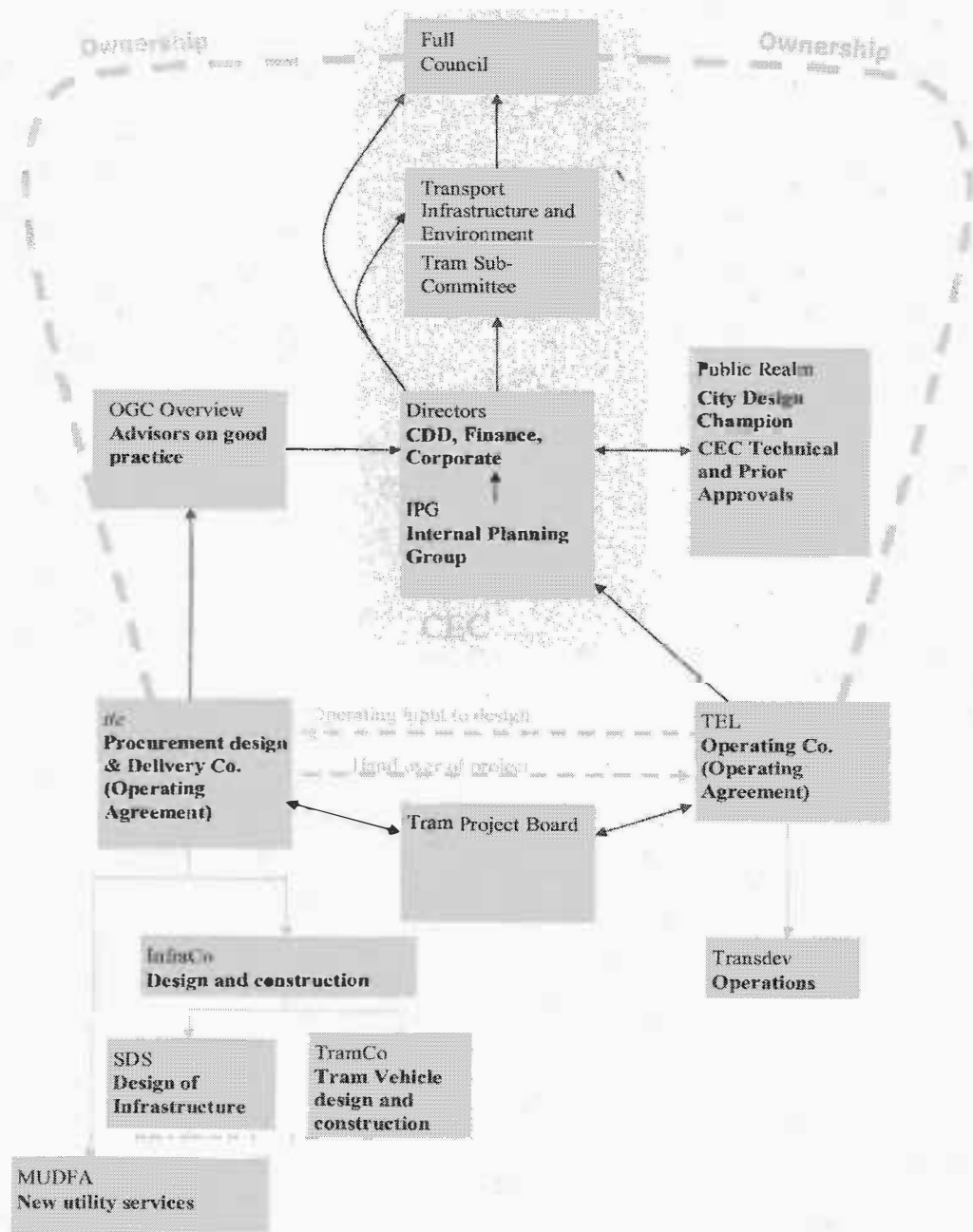
- Appendix 1** Tram Governance Organogram
- Appendix 2** Draft tie Ltd Operating Agreement
- Appendix 3** Resolutions

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Wards affected All

Background Papers Edinburgh Tram Final Business Case Version 2
Draft Funding Letter from Transport Scotland

Appendix 1 Tram Organisational Structure



Appendix 2 Draft tie Operating Agreement

AGREEMENT

between

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

and

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

Whereas:-

1. The Council set up tie in May 2002 to assist the Council with implementing its local transport strategy;
2. Powers were conferred upon the Council in relation to the design, construction, commissioning and operation of the Edinburgh Tram Network in terms of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 and the Council wishes to delegate certain of these powers to tie;
3. The Council is the designated planning and roads authority for the City of Edinburgh;
4. A general operating agreement between tie and the Council was previously entered into whereby tie agreed to provide services to the Council in developing, procuring and implementing integrated transport projects within Edinburgh, including the delivery of the proposed tram system for Edinburgh;

5. The terms of the tram Final Business Case and the fact that tie was to enter into various agreements in relation to the Project were approved by the Council on 20 December 2007; and
6. The parties now wish to enter into this agreement to more particularly regulate the relationship between the parties specifically with regard to the procurement and delivery of the trams Project and to define the services tie will provide to the Council.

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

1 Definitions

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

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

	and several basis), as it may be amended from time to time;
“Legislation”	means all rules, regulations, by-laws, directives, statutes and other binding provisions in force from time to time;
“Phase 1A”	means phase 1A as more particularly described in the Final Business Case;
“Phase 1B”	means phase 1B as more particularly described in the Final Business Case;
“Project”	means the procurement and delivery of a tram system for Edinburgh (Phase 1A and Phase 1B and any approved extension), as more particularly described in the Final Business Case and approved by the Council in terms of scope;
“Services”	means all the services to be provided by tie as specified in this Agreement, including, without limitation, those specified in Schedule 1;
“Tram Acts”	means Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006;
“Tramco Contract”	means the contract between tie and CAF, as it may be amended from time to time;
“Tram Monitoring Officer”	means the Council officer nominated by the Council to monitor tie in relation to the Project; and
“Transport Edinburgh Limited” or “TEL”	means the company incorporated under the Companies Acts and having its registered office at City Chambers, High Street, Edinburgh (Registered

	Number SC269639).
“Lothian Buses plc”	means the company incorporated under the Companies Acts and having its registered office at 55 Annandale Street, Edinburgh EH7 4AZ (Registered Number SC096849).

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

2. tie’s Obligations

2.1 tie hereby agree to provide the Services to the Council throughout the duration of this Agreement in order to assist in, carry out, promote, manage and administer the Project.

- 2.2 tie shall ensure that all third party advisers and contractors engaged by it shall provide a direct duty of care to the Council in terms acceptable to the Council prior to carrying out any work in relation to the Project, failing which the appointment of any such third party will require the written approval of the Tram Monitoring Officer.
- 2.3 tie shall use best endeavours to ensure that it delivers a tram system for Edinburgh as specified in the Final Business Case and the Infraco Contract (including the Employer’s Requirements). tie shall use best endeavours to comply with all timescales and financial projections detailed in the Final Business Case.

- 2.4 tie shall use best endeavours to ensure that it is at all times suitably resourced to carry out all the Services in relation to the Project.
- 2.5 tie shall use best endeavours to ensure that it does not cause the Council to breach the terms of the Funding Agreement. In particular tie shall use best endeavours to ensure that the Council complies with the conditions relating to publicity in the Funding Agreement.
- 2.6 tie shall use best endeavours to ensure that it complies with and, where it acts on the Council's behalf, shall use best endeavours to ensure that the Council complies with, all Legislation (including all health and safety legislation) relevant to the Project at all times.
- 2.7 tie shall use best endeavours to ensure that all work sites related to the Project are appropriately managed and supervised at all times to ensure compliance with all health and safety Legislation.
- 2.8 tie shall use best endeavours to ensure that it does not infringe the intellectual property rights of any third party at any time.
- 2.9 tie shall use, and shall use best endeavours to procure that all contractors, employees and other third parties which it engages shall use, all reasonable skill, care and diligence in the provision of the Services. All work undertaken by tie shall be progressed with due expedition and without delay to achieve timeous completion of the Project.
- 2.10 tie shall discharge all its obligations in terms of this Agreement in a proper, honest, faithful and diligent manner and shall at all times act in the best interests of the Council (to the fullest extent permitted by law).
- 2.11 Insofar as permitted by law, tie shall at all times promptly comply with all reasonable requests made of it by the Council.
- 2.12 tie shall at all times maintain in place appropriate policies of insurance in relation to all elements of its business and in particular the Project, provided that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as tie. tie shall promptly inform the Tram Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled. tie shall provide evidence of all such insurances upon request by the Council. tie shall ensure that the Council is covered as an insured party under the

- Edinburgh Tram Network Owner Controlled Insurance Programme covering the material damage and third party liability sections and under all other policies of insurance which tie has arranged, where it is possible to do so at reasonable commercial cost.
- 2.13 tie shall ensure that all contractors and consultants engaged or employed by it in any capacity shall have in place a policy of insurance providing tie with appropriate indemnity for all risks relevant to their engagement provided that each insurance is available in the United Kingdom insurance market at commercially reasonable rates and on commercially reasonable terms to businesses of the same status and discipline as the contractor or consultant. tie shall promptly inform the Tram Monitoring Officer in writing if any insurance ceases to be maintained and/or ceases to be available in the United Kingdom market at commercially reasonable rates and or commercially reasonable terms. In this event, the parties shall meet to discuss the means by which any risks previously covered by insurance should be managed, mitigated or controlled.
- 2.14 tie will ensure that the Corporate Public & Products Liability and Professional Indemnity policies are to include an indemnity to principals clause protecting the interest of the Council as principal.
- 2.15 tie shall provide to the Tram Monitoring Officer upon request, and in any event not less than annually, a report providing full details of all the insurances relating to the Project, including *inter alia* details of (i) the contractors or consultants providing insurance cover to tie and the Council and level of cover provided; and (ii) contractors or consultants not providing insurance cover and details of the authorisation obtained from the Tram Monitoring Officer in this regard.
- 2.16 tie shall use best endeavours to ensure best value when providing the Services and in the discharge of all of tie's responsibilities. tie shall use best endeavours to ensure best value in the use of funds or resources provided through or by the Council.
- 2.17 tie shall continue to apply principles of good corporate governance and to adopt and adhere to the Council's Code on Corporate Governance (approved by the Council on 29 June 2006) as it may be amended from time to time.

- 2.18 tie shall allow the Council, its auditors or the Council's other delegated appointees to examine the books, accounts and other records kept by tie (and any subsidiary undertakings of tie) and shall supply the Council with such financial and other information as it may reasonably request from time to time to keep the Council fully informed about the business of tie (and any subsidiary undertakings) and to protect the Council's interests in relation to the terms of this Agreement. tie will supply to the Tram Monitoring Officer copies of all relevant tie and other board papers in connection with the governance arrangements set out in Schedule 2.
- 2.19 tie shall use best endeavours to ensure that it and all third parties it engages and/or contracts with to carry out any works shall at all times comply with all equalities legislation and shall act in a non-discriminatory manner.
- 2.20 tie shall use best endeavours to comply with the governance diagram set out in Schedule 2. The parties agree that where this Agreement refers to tie reporting to, or obtaining approval from, the Council or as the case may be the Tram Monitoring Officer, all such activity shall be made in accordance with this governance diagram.
- 2.21 tie shall liaise with the Tram Monitoring Officer, the Council, and any other bodies which the Council may specify, regularly and shall report to the Council on a four-weekly and annual basis with regard to financial matters and progress generally on the Project in a format acceptable to the Council.
- 2.22 Immediately that tie becomes aware of the likelihood of delay to, or overspend in, the Project it shall notify the Tram Monitoring Officer at the earliest opportunity, informing them of the reasons for the potential delay or overspend and detailing any measures (together with costs) which may mitigate such potential delay or overspend.
- 2.23 Immediately tie becomes aware that it requires a decision or information essential to the continuity of the Project from the Council to achieve key dates in the Project, tie shall give notice of such requirement to the Tram Monitoring Officer with full supporting information to mitigate any delay to the Project to the fullest extent possible.
- 2.24 tie shall not settle any single claim in excess of £500,000, or series of claims in any 12 month period which would exceed in aggregate £1,000,000, without prior written approval from the Tram Monitoring Officer. In accordance with

the terms of Clause 2.20, all such claims approval will be subject to the governance arrangements set out in Schedule 2.

- 2.25 tie shall procure that its Remuneration Committee prepares and submits to the Tram Monitoring Officer for written approval in advance of annual reporting periods a statement setting out the remuneration policy of tie as it will apply in the succeeding annual reporting period. The statement will include, but not be restricted to, the benchmarks and procedures for proposed bonus achievement and the outcomes to which any such bonuses are linked. tie will not award any bonus until the approval noted above has been received by it and tie will supply all such additional information as the Tram Monitoring Officer may reasonably require in order to give their approval.
- 2.26 tie will provide a business plan for approval by the Council on an annual basis.
- 2.27 tie shall use best endeavours to ensure that it and all contractors engaged by it protect the Council's reputation all at times in matters relating to the Project.
- 2.28 tie shall not novate or otherwise transfer any rights or obligations under any contractual arrangement which the Council has approved and to which tie is a party without the prior written consent of the Tram Monitoring Officer.
- 2.29 tie shall comply with the terms of all agreements to which it is a party unless authorised in writing by the Tram Monitoring Officer to do otherwise.
- 2.30 tie shall produce a communications protocol and have this approved quarterly in writing by the Tram Monitoring Officer. The communications protocol will inter alia reflect the publicity arrangements referred to in Clause 2.5 of this Agreement.
- 2.31 tie will be subject to an independent peer review panel concerning the management of the Project (including all the contract documentation) and will implement all reasonable recommendations of the panel once approved under the governance arrangements set out in Schedule 2.

3. Council's Obligations and Delegation

- 3.1 The Council hereby delegates to tie, such delegations confirmed for the purposes of section 69 of the respective Tram Acts, full legal authority to (i) enter into and manage the Infraco Contract; (ii) to enter into and novate the

- Tramco Contract; and (iii) novate the agreement between tie and Parsons Brinkerhoff Limited dated 19 September 2005..
- 3.2 The Council agrees to guarantee tie's financial obligations in relation to certain aspects of the Project on terms acceptable to the Council.
 - 3.3 On the basis that tie has, in the reasonable opinion of the Council, provided adequate evidence that expenditure has been properly and appropriately incurred in relation to the provision of the Services and the Project, the Council will release the funding which it has secured for such expenditure and shall pass funding to tie to allow tie to discharge its obligations in terms of this Agreement
 - 3.4 The Council will nominate a Council officer to act as a liaison point for day-to-day communication between the Company and the Council.
 - 3.5 The Council will appoint a Tram Monitoring Officer. The first Tram Monitoring Officer will be the Director of City Development or their appointed nominee.
 - 3.6 The Tram Monitoring Officer will be responsible for determining what approval is required from within the Council to allow them to give any consent or recommendation required in terms of this Agreement. The parties acknowledge that the Tram Monitoring Officer may require to obtain approval of their proposed actions from the full Council or from a relevant committee or sub-committee as appropriate.
 - 3.7 The Council will ensure that, in the Council's opinion, adequate personnel are made available to the Project to fulfill the Council's role in relation to the Project and that all such personnel shall use reasonable skill and care in executing their responsibilities.
 - 3.8 The Council acknowledges that tie continues to work on other projects in addition to the Project, but tie will use best endeavours to manage such projects in order that they do not conflict with the terms of this Agreement.
 - 3.9 The Council agrees to waive its rights to claim against any non-executive director of tie, save in respect of any criminal, fraudulent or willfully negligent action of any such non-executive director.
 - 3.10 The parties acknowledge that one of the main purposes of establishing tie and its sister company Transport Edinburgh Limited is to facilitate the integration of the operation of trams and buses in the City of Edinburgh and to assist the

Council, tie, Lothian Buses plc and TEL to function as a single coordinated entity in the delivery, management, operation and ownership of an integrated transport system.

4. Term

- 4.1 This Agreement shall commence on 2008 and shall continue until termination is agreed between the parties, unless otherwise terminated earlier in accordance with its terms.

5. Responsibility

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

6. Termination

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

7. Dispute Procedure

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

8. Transfer and Sub-contracting

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

9. Notices

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

10. Freedom of Information

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

11. Nature of Relationship

- 11.1 Nothing in this Agreement shall create a relationship of agency (save where the Council expressly authorises tie to act as its agent) or partnership between the parties with regard to its subject matter.

- 11.2 Nothing in the Agreement shall prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as a local authority or in terms of any Legislation.

12. **Entire Agreement and Variations**

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

13. **Severability**

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

14. **Waiver**

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

15. **Governing Law and Jurisdiction**

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

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

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

Witness.....

Full Name.....

.....
Proper Officer

Address.....

.....

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

Director.....

Director/Secretary.....

SCHEDULE 1

CEC Operating Agreement – Schedule 1 : Scope of Services

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

Schedule 2
Governance Diagram

Appendix 3 Resolutions

Council resolves in terms of (a) Edinburgh Tram (Line One) Act 2006, Section 69 (2) & (3) and (b) Edinburgh Tram (Line Two) Act 2006, Section 68 (2) & (3)

1. To enter into an agreement with tie Limited whereby tie Limited is permitted to exercise the powers of authorised undertaker to enter into and manage a contract (“the Infraco Contract”) with Bilfinger Berger UK Ltd and Siemens plc (together “the Infraco” acting with joint and several liability) for the design, construction and maintenance of the Edinburgh Tram Network Phase 1a (and Phase 1b infrastructure) such Infraco Contract to be on terms approved by the tie Limited Board;
2. To enter into an agreement with tie Limited whereby tie Limited is permitted to exercise the powers of authorised undertaker to enter into the tram vehicle and tram maintenance contracts with Construcciones y Auxiliar de Ferrocarriles S.A. on terms acceptable to tie Limited and to novate the contracts to the Infraco at the time of the execution of the Infraco Contract, such tram vehicles and tram maintenance contracts to be on terms approved by the tie Limited Board;
3. To authorise tie Limited to novate the design contract dated 19 September 2005 between tie Limited and Parsons Brinkerhoff Limited to Infraco in accordance with the terms of that agreement (and such other conditions as tie may agree) at the time of execution of the Infraco Contract.
4. To authorise tie Limited to make such use of (and amendment to) the agreement dated 14th May 2004 between tie Limited and Transport Edinburgh Tram Limited as tie sees fit in connection with the operation of the authorised works under the Tram Act.
5. To notify Scottish Ministers in accordance with the provision of the Tram Acts that an agreement has been entered into between the Council and tie concerning the exercise of certain of the statutory powers granted to the Council.