

**PRIVILEGED IN CONFIDENCE
FOI(S)A EXEMPT**

among

(1) **tie** LIMITED

and

(2) THE CITY OF EDINBURGH COUNCIL

and

(3) BILFINGER BERGER CIVIL UK LIMITED

and

(4) SIEMENS plc

and

(5) CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.

Settlement Agreement
in respect of the
EDINBURGH TRAM NETWORK

SETTLEMENT AGREEMENT

among

- (1) **tie LIMITED** (company number SC230949), whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("**tie**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
- (2) **THE CITY OF EDINBURGH COUNCIL** the local authority for the City of Edinburgh constituted in terms of the Local Government etc (Scotland) Act 1994 and having its principal offices at City Chambers, High Street, Edinburgh EH1 1YJ ("**CEC**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
- (3) **BILFINGER BERGER CIVIL UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 3rd Floor Braywick Gate, Braywick Road, Maidenhead, Berkshire SL6 1DA ("**BBUK**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
- (4) **SIEMENS PLC**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey, GU16 8QD ("**Siemens**") which expression shall include its personal representatives, successors, permitted assignees and transferees; and
- (5) **CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.**, a company registered in Spain and having its registered office at J. M. Iturrioz 26, 20200 Beasain, Spain ("**CAF**") which expression shall include its personal representatives, successors, permitted assignees and transferees,

(1), (2), (3), (4) and (5) together the "**Parties**",

(3), (4) and (5) together the "**Infraco**".

BACKGROUND

- A **tie** and Infraco (at that time comprising BBUK and Siemens) entered into a contract on 14 May 2008 under which Infraco was appointed to carry out and/or manage the design, construction, installation, commissioning, tram procurement, system integration, infrastructure maintenance, tram maintenance and supply of related equipment and materials, trams and related infrastructure in respect of the Edinburgh Tram Network (such contract, amended as detailed below, is herein after referred to as the "**Infraco Contract**");
- B By an agreement in writing dated 13 May 2008 ("**Tram Supply Agreement**") **tie** appointed CAF to design, manufacture and supply 27 Trams and to supply documentation and associated equipment in connection with the Edinburgh Tram Network;
- C By an agreement in writing dated 13 May 2008 ("**Tram Maintenance Agreement**") **tie** appointed CAF to provide services for the ongoing maintenance of the Trams and for the supply of consumables and spares for the Trams in connection with the Edinburgh Tram Network;
- D By a Minute of Variation in writing dated 14 May 2008 ("**MoV1**"), **tie**, BBUK, Siemens and CAF agreed that CAF would become a party to the Infraco Contract;
- E By agreements in writing dated 14 May 2008 ("**Novation of Tram Supply and Tram Maintenance Agreements**") **tie** and BBUK/Siemens agreed, with the consent of CAF as the Tram Supplier and Tram Maintainer, that BBUK/Siemens would take over the rights

and liabilities of **tie** as the "Client" (as defined in the Tram Supply Agreement and Tram Maintenance Agreement) under the Tram Supply and the Tram Maintenance Agreements;

F The Infraco Contract was amended by the Princes Street Supplemental Agreement entered into between the Parties (excluding CEC) in March 2009 and re-executed on 29 May 2009, a Minute of Variation between the Parties (excluding CEC) dated 3 June 2009 ("**MoV2**") and a Minute of Variation between the Parties (excluding CEC) dated 23 April 2010 ("**MoV3**");

G Following a mediation between the Parties which took place at Mar Hall between 8 and 12 March 2011 ("**Mediation**"), **tie** and Infraco entered into a Minute of Variation dated 20 May and 10 June 2011 ("**MoV4**") in order to vary the Infraco Contract to give effect to the Prioritised Works (as therein defined); and

H Following the Mediation it was agreed that the Parties and CEC would enter into this Settlement Agreement to give effect to the agreement reached at the Mediation.

1. **DEFINITIONS AND INTERPRETATION**

1.1 The definitions given in the parties section and the recitals to this Settlement Agreement and those set out below apply to this Settlement Agreement:

1.1.1 "**Tram Interface Agreement**" means the agreement in the form set out in the Schedule Part D to be entered into on or around the date of this Settlement Agreement;

1.1.2 "**Tram Supplier Integration**" has the meaning given in the Tram Interface Agreement signed on or around the date of this Agreement.

1.2 In the context of this Settlement Agreement where the Infraco Contract has defined a meaning to any capitalised word or expression used in this Settlement Agreement, the same meaning shall be given to it in this Settlement Agreement.

1.3 Clause headings in this Settlement Agreement are for the convenience of the parties to this Settlement Agreement only and do not affect its interpretation.

1.4 Unless the context otherwise requires:

1.4.1 words importing gender include masculine, feminine and neuter;

1.4.2 the singular includes the plural, and vice versa; and

1.4.3 a reference to any Clause, Sub-Clause or Schedule is, except where it is expressly stated to the contrary, a reference to such clause, sub-clause or schedule to this Settlement Agreement and reference in any Schedule to any Part, Paragraph or Sub-Paragraph is, except where it is expressly stated to the contrary, a reference to such part, paragraph or sub-paragraph of that Schedule (as the case may be).

1.5 From the date of this Settlement Agreement, but subject to Clause 3.1(a) below, the Parties rights and obligations under MoV4 shall cease.

2. **AMENDMENT OF THE INFRACO CONTRACT**

2.1 The Parties (excluding CEC) hereby agree that (i) the amendments to the Infraco Contract shown in the mark up of the Infraco Contract included in the Schedule Part A Section 1 and Section 2 to this Settlement Agreement are hereby incorporated into the Infraco Contract and (ii) the amendments incorporated into the Infraco Contract under MoV1 to include CAF as a party to the Infraco Contract are hereby deleted from the Infraco Contract. The provisions of the Infraco Contract shall have effect as so modified.

- 2.2 The terms and conditions of this Settlement Agreement, together with the Schedule Part A, represent the entire agreement between the Parties (excluding CEC) relating to the amendment of the Infraco Contract. Save as amended or dis-applied by this Settlement Agreement, all the terms and conditions of the Infraco Contract remain in full force and effect.
- 2.3 The Parties (excluding CEC) agree that from the date of this Settlement Agreement Clause 2.4 of MoV1 shall be dis-applied. **tie** agrees that from the date of this Settlement Agreement it shall release BBUK and Siemens from all and any liability of any kind whatsoever and howsoever arising whether past, present or future, under Clause 2.4 of MoV1.

3. FULL AND FINAL SETTLEMENT

3.1 The Parties agree that subject to clause 3.2 and clause 3.3, this Settlement Agreement is entered into in full and final settlement of all Disputes claims and entitlements, whether past, present or future, of any kind whatsoever and howsoever arising (whether in contract, delict (including negligence), for breach of (or compliance with) statutory duty, restitution or under any other theory of law, which arise out of or in connection with the Infraco Contract or the Infraco Works and which are founded upon facts events or circumstances occurring prior to the date of this Settlement Agreement, except:

- (a) (i) any unresolved Disputes, claims or entitlements, notified in writing, by or against BBUK, Siemens **tie** or CEC in relation to the Prioritised Works (as defined in MOV4) accrued before the date of this Settlement Agreement (ii) any other entitlements listed in Schedule Part E to this Settlement Agreement and (iii) BBUK/Siemens' claim for payment (the entitlement to which is agreed in principle but the amount of the payment requires to be quantified and agreed) arising from the prolongation of the Infraco Works in the revision of the Programme from revision 3a to revision 4;
- (b) any Disputes, claims or entitlements by or of **tie** or CEC against BBUK/Siemens resulting from third party claims brought against **tie** or CEC (other than (i) claims brought against **tie** by any of the Indemnified Parties and (ii) claims brought against **tie** which relate to the performance of the Tram Supply Obligations and Tram Maintenance Services);
- (c) any Disputes claims or entitlements by or of **tie** against BBUK/Siemens which relate to a failure by BBUK/Siemens to comply with their system integration obligations under the Infraco Contract (in particular those obligations set out in clause 12 of the Infraco Contract); and
- (d) any Disputes, claims or entitlements by or of **tie** against BBUK/Siemens which relate to defects errors or omissions in the Infraco Works which BBUK/Siemens are responsible for pursuant to the terms of the Infraco Contract and which are due to design, materials, services or work which are not in accordance with the Infraco Contract.

3.2

- 3.2.1 The settlement referred to in clauses 3.1 and 3.3 shall not prejudice any claim by BBUK, or Siemens against CAF under the Tram Interface Agreement and shall not prejudice any claim brought after the date of this Settlement Agreement by BBUK/Siemens against **tie** in respect of clause 12 of the Infraco Contract.
- 3.2.2 The settlement referred to in clauses 3.1 and 3.3 shall not prejudice any claim brought after the date of this Settlement Agreement by CEC under the Tram Supply Agreement or the Tram Maintenance Agreement or by CAF pursuant to clause 4.13.

3.3 Without prejudice to clause 3.2 and CAF's rights and obligations under the Tram Supply Agreement, the Tram Maintenance Agreement and the Tram Interface Agreement and notwithstanding that the Infraco Contract states that BBUK, Siemens and CAF shall have joint and several liability under the Infraco Contract, from the date of this Settlement Agreement:

- (a) CAF shall have no further liability under the Infraco Contract;
- (b) **tie** and CEC release and discharge CAF from any and all duties, obligations and liabilities owed under the Infraco Contract; and
- (c) **tie** and CEC waive against CAF all rights of action, claims or remedies it may have pursuant to the Infraco Contract.

3.4 Without prejudice to its other rights and remedies in relation to any existing breach or other claim (whether known or unknown at the date of this Settlement Agreement and whether or not the subject of any Remediable Termination Notice or Underperformance Warning Notice issued prior to the date of this Settlement Agreement) in relation to the Infraco Contract (save for those settled pursuant to clause 3.1), **tie** agrees not to take any further action pursuant to any Remediable Termination Notice or Underperformance Warning Notice served prior to the date of this Settlement Agreement.

4. **NOVATION**

4.1 Without prejudice to the terms of the Tram Interface Agreement CAF:

- (a) releases and discharges BBUK/Siemens from any and all duties, obligations and liabilities owed to CAF under the Tram Supply Agreement and the Tram Maintenance Agreement and accepts the liability of CEC under the Tram Supply Agreement and the Tram Maintenance Agreement in lieu of BBUK/Siemens; and
- (b) waives against BBUK/Siemens all rights of action, claims or remedies it may have pursuant to the Tram Supply Agreement and the Tram Maintenance Agreement.

4.2 Without prejudice to the terms of the Tram Interface Agreement, BBUK/Siemens releases and discharges CAF from the further performance of CAF's duties and obligations under the Tram Supply Agreement and the Tram Maintenance Agreement.

4.3 Without prejudice to the terms of the Tram Interface Agreement CAF undertakes to CEC to continue to perform all the duties and to discharge all the obligations of CAF under the Tram Supply Agreement and the Tram Maintenance Agreement and to be bound by their terms and conditions in every way as if CEC was and always had been a party to the Tram Supply Agreement and the Tram Maintenance Agreement in place of BBUK/Siemens.

4.4 CAF warrants to CEC that, in respect of the duties and obligations which it has already performed under the Tram Supply Agreement and the Tram Maintenance Agreement, it has performed those duties and obligations in compliance with all of the terms and conditions thereof and warrants to CEC that it shall be liable for any breach of the Tram Supply Agreement and the Tram Maintenance Agreement prior to the date of this Settlement Agreement.

4.5 Without prejudice to Clauses 4.3 or 4.4, CAF shall not contend under this Settlement Agreement that its liability to CEC is affected or diminished by reason of BBUK/Siemens having suffered no loss and/or any loss claimed to have been suffered by CEC being different in character from that suffered by BBUK/Siemens.

4.6 CAF confirms it was aware at the time of entering into the Tram Supply Agreement and the Tram Maintenance Agreement that CEC could suffer losses, damages, costs,

expenses, claims, demands and proceedings as a result of CAF's breach of the Tram Supply Agreement and the Tram Maintenance Agreement.

4.7

4.7.1 Without prejudice to the generality of this Settlement Agreement, CAF warrants and undertakes to CEC that its duties and obligations under the Tram Supply Agreement and the Tram Maintenance Agreement, whether or not required to be performed prior to the date hereof, have been and will be performed in accordance with the Tram Supply Agreement and the Tram Maintenance Agreement as appropriate and BBUK/Siemens warrant and undertake to CEC that except as provided for in this Settlement Agreement they have not waived or released CAF from any of its obligations under, nor varied the scope or terms of, the Tram Supply Agreement or the Tram Maintenance Agreement and that they are not personally barred from enforcing or seeking redress for any failure of CAF to comply with the Tram Supply Agreement or the Tram Maintenance Agreement which failure BBUK/Siemens' senior management (who for the avoidance of doubt shall include Martin Foerder, Patrick Scully and Kevin Russell) were aware of at the date of this Settlement Agreement.

4.7.2 CAF undertakes that it will not plead or rely on:-

- (a) the defences of personal bar on the grounds of BBUK/Siemens' words and/or actions and/or omissions prior to the date of this Settlement Agreement in response to any claims by CEC under the Tram Supply Agreement (other than in relation to Tram Supplier Integration (as defined in the Tram Interface Agreement)) or the Tram Maintenance Agreement (other than in relation to Tram Supplier Integration) in respect of failures of CAF to comply with the Tram Supply Agreement or the Tram Maintenance Agreement; which failures CAF's senior management (who for the avoidance of doubt shall include the CAF International Business Division Western Europe Director and the CAF UK and Ireland Business Development Director involved with CAF's work in connection with the Edinburgh Tram Network) were aware of as at the date of this Settlement Agreement;
- (b) the defence of waiver on the grounds of BBUK/Siemens' words and/or actions prior to the date of this Settlement Agreement in response to any claims by CEC under the Tram Supply Agreement (other than in relation to Tram Supplier Integration (as defined in the Tram Interface Agreement)) or the Tram Maintenance Agreement (other than in relation to Tram Supplier Integration).

4.8 CAF acknowledges that any breach of the warranties in this Settlement Agreement may cause **tie** to be in breach of the Infraco Contract and/or cause **tie** and/or CEC to suffer loss and/or damage.

4.9 CAF acknowledge that CEC have and shall continue to rely upon all the Tram Works (as defined in the Tram Supply Agreement) and Services (as defined in the Tram Maintenance Agreement) provided by CAF under the Tram Supply Agreement and the Tram Maintenance Agreement.

4.10 Without prejudice to the terms of the Tram Interface Agreement all rights of action, claims, and remedies against CAF under and pursuant to the Tram Supply Agreement and the Tram Maintenance Agreement vested in BBUK/Siemens (including their accrued rights of action and remedies) shall automatically and without the need for any further action on the part of CEC, vest in CEC on the date of this Settlement Agreement.

4.11 Subject to clause 4.13, with effect from the date of this Settlement Agreement CEC undertakes to perform all the duties and to discharge all the obligations of BBUK/Siemens under the Tram Supply Agreement and the Tram Maintenance Agreement and to be bound by their terms and conditions in every way as if CEC was and always had been a

party to the Tram Supply Agreement and the Tram Maintenance Agreement in place of BBUK/Siemens.

- 4.12 With effect from the date of this Settlement Agreement, all rights of action claims and remedies under or pursuant to the Tram Supply Agreement and the Tram Maintenance Agreement vested in CAF shall, to the extent the same are founded upon facts, events or circumstances occurring on or after the date of this Settlement Agreement, lie against CEC and not BBUK/Siemens.
- 4.13 With effect from the date of this Settlement Agreement, CAF waives as against CEC all rights of action, claims or remedies it may have pursuant to the Tram Supply Agreement and the Tram Maintenance Agreement to the extent the same are founded upon facts, events or circumstances occurring prior to the date of this Settlement Agreement except any such rights of actions, claims or remedies:
- (i) founded upon clause 81 of or Schedule 25 to the Tram Supply Agreement (*Minute of Variation to the Tram Supply Agreement*); and/or
 - (ii) founded upon clause 68 of the Tram Maintenance Agreement.

The Parties agree that all rights of action claims and remedies founded on the events and circumstances set out in clause 4.13(i) to (ii) shall lie against CEC and not BBUK/Siemens.

- 4.14 The Parties and CEC agree that the terms of the Tram Supply Agreement and the terms of the Tram Maintenance Agreement shall be and are varied in the manner set out in the Schedule Part B and the Schedule Part C respectively and that references to the Tram Supply and Tram Maintenance Agreements in clauses 5.3, 5.7 (if applicable), 5.9 (if applicable), 5.11, 5.12 and 5.13 shall be deemed to be references to such agreements as amended.
- 4.15 Nothing in the Settlement Agreement shall operate to entitle CEC to maintain and CEC waives all and any rights they may have to maintain on and at any time after the date of this Settlement Agreement that any instructions, approvals, certificates, consents, directions, reviews, extensions of time, relief, allowances, acceptances and the like ("Client Decisions and Instructions") given or carried out by BBUK/Siemens or the Client Representative appointed by BBUK/Siemens under the Tram Supply Agreement and the Tram Maintenance Agreement prior to the date of this Settlement Agreement are not valid and proper Client Decisions and Instructions given or carried out under the Tram Supply Agreement and the Tram Maintenance Agreement by virtue of the fact that such Client Decisions and Instructions are given or carried out by a party other than CEC or a Client Representative appointed by CEC.
- 4.16 Nothing in the Settlement Agreement shall operate to entitle CEC to maintain and CEC waives all and any rights they may have to maintain on and at any time after the date of this Settlement Agreement that any information, notifications, notices, certificates and the like ("CAF Information") given by CAF to BBUK/Siemens or to the Client Representative appointed by BBUK/Siemens under the Tram Supply Agreement and the Tram Maintenance Agreement prior to the date of this Settlement Agreement has not been validly and properly given under the Tram Supply Agreement and the Tram Maintenance Agreement by virtue of the fact that such CAF Information is given to a party other than CEC or a Client Representative appointed by CEC.
- 4.17 Notwithstanding any other provision of this Settlement Agreement; with effect from the date of this Settlement Agreement, CEC waives all rights of action, claims and remedies against CAF under or pursuant to the Tram Supply Agreement and the Tram Maintenance Agreement that may arise as a consequence of any failure by CAF to comply with any of the programme dates set out in Schedule 4 (Programme) to the Tram Supply Agreement (or as adjusted in accordance with the Tram Supply Agreement) prior to the Schedule 4 to the Tram Supply Agreement being varied in the manner set out in the Schedule Part B.

5. **CONFIDENTIALITY**

The Parties (whether acting by or through their respective directors, officers, servants or agents or any of them or through any company or otherwise howsoever) shall keep confidential and not discuss or disclose to any other person either generally or specifically the terms of this Settlement Agreement and/or any and all circumstances leading to the Disputes or this Settlement Agreement, save as (i) may be necessary for the purposes of implementing and/or enforcing the terms of this Settlement Agreement; (ii) is considered necessary by CEC to allow it to comply with the terms of the Freedom of Information (Scotland) Act 2002 ("**FOISA**") and/or the Environmental Information (Scotland) Regulations 2004 ("**EISR**"); and/or (iii) if compelled to do so by any Court or authority of competent jurisdiction. Subject to the above, for the avoidance of doubt, the Parties agree that in the event that any enquiries are made by any third party in relation to this Settlement Agreement and any and/or all of the circumstances leading to this Settlement Agreement, the Parties or any of them shall respond that they have no comment to make with regard to those matters. The Parties agree that clauses 101.7 to 101.11 (inclusive) of the Infraco Contract shall apply to any requirements for disclosure under FOISA and/or EISR relating to this Settlement Agreement.

6. **COMMUNICATIONS PROTOCOL**

By their execution of this Settlement Agreement the Parties agree that any required statement shall be prepared by CEC and provided to Infraco for approval, such approval not to be unreasonably withheld or delayed. **tie** and CEC acknowledge that Infraco are required to seek relevant company head quarters final approval for release of any such statement, such approval not to be unreasonably withheld or delayed.

7. **VARIATION**

This Settlement Agreement to the extent it relates to the Infraco Contract is a variation to the Infraco Contract for the purposes of Clause 108 (*Variations to be in Writing*) of the Infraco Contract.

8. **LAW AND JURISDICTION**

8.1 This Settlement Agreement and any matters arising from this Settlement Agreement shall be governed by and construed in accordance with Scots law.

8.2 The Parties hereby irrevocably submit to the exclusive jurisdiction of the Court of Session in relation to this Settlement Agreement and any such matter.

IN WITNESS WHEREOF these presents on this and the preceding six pages together with the Schedule which is annexed and subscribed as relative hereto are executed as follows:

EXECUTED for and on behalf of **tie LIMITED**

at *EDINBURGH*

on *15 SEPTEMBER* 2011 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

DAVID ALEXANDER ANDERSON

LAURA CATHERINE ALLISON

EXECUTED for and on behalf of **THE CITY OF EDINBURGH COUNCIL**

at *EDINBURGH*

on *15 SEPTEMBER* 2011 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

JUE BRUCE

LAURA CATHERINE ALLISON

EXECUTED for and on behalf of **BILFINGER BERGER CIVIL UK LIMITED**

at *EDINBURGH*

on *15 SEPTEMBER* 2011 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

[Redacted]

MARTIN FORDE

[Redacted]

LAURA CATHERINE ALLISON

[Redacted]

EXECUTED for and on behalf of **SIEMENS PLC**

at *EDINBURGH*

on *15 SEPTEMBER* 2011 by:

Authorised Signatory

Full Name

AUTHORISED SIGNATORY
Witness Signature

Full Name

Address

[Redacted]

/ Axel Eickhorn

EXECUTED for and on behalf of **CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.**

at *EDINBURGH*

on *15 SEPTEMBER* 2011 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

[Redacted]

Antonio M. Camps

[Redacted]

LAURA CATHERINE ALLISON

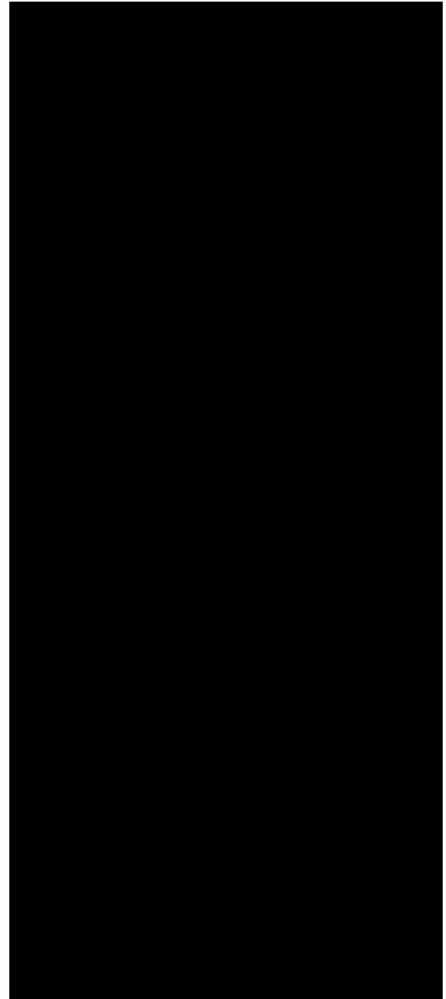
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SCHEDULE

Part A

Section 1

Amendments to Infraco Contract



Schedule Part 2 (Employer's Requirements)

Delete and substitute the attached.

Schedule Part 4 (Pricing)

Delete and substitute the attached.

Schedule Part 5 (Milestone Payments)

Delete and substitute the attached.

Schedule Part 6 (Maintenance Payment Regime)

Delete and substitute the attached.

Schedule Part 7 (Maintenance Contract Pricing Analysis)

Delete and substitute the attached.

Schedule Part 9 (Dispute Resolution Procedure)

Delete and substitute the attached.

Schedule Part 14 (Design Review and Design Management Plan)

Delete and substitute the attached.

Schedule Part 15 (Programme)

Delete and substitute the attached.

Schedule Part 32 (Depot Licence)

Delete and substitute the attached.

Schedule Part 34 (Tram Inspector Agreement)

Delete and substitute the attached.

Schedule Part 35 (Reporting Period End Dates and Valuation Dates)

Delete and substitute the attached.

Schedule Part 39 (Tram Supply Agreement and Tram Maintenance Agreement Obligations)

Delete.

Schedule Part 41 (Ground Conditions and Utilities Information)

Delete.

Schedule Part 45 (On Street Works)

Insert the attached.

Part A

Section 2

Amendments relating to Edinburgh Tram Network Definitions

SCHEDULE

Part B

SCHEDULE

Part C

SCHEDULE

Part D

Tram Interface Agreement

SCHEDULE

Part E

Exceptions to Settlement

