

30.4 The Infraco shall use reasonable endeavours to procure that other persons authorised to be on the Designated Working Area (so far as the same is under its control) comply with all their respective duties and obligations under all Law and requirements having the force of law relating to the health, safety and conduct of construction or maintenance operations.

31. CARE OF THE INFRACO WORKS

31.1 Save in respect of the Trams and Tram Related Equipment, the Infraco shall 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.

31.2 In relation to each Section, from the date of issue of a Certificate of Sectional Completion in relation to that Section the provisions of Clause 52 (*Maintenance*) shall apply.

31.3 In the event of any loss or damage to the Infraco Works or part thereof while the Infraco is responsible for the care thereof in terms of Clause 31.1, the Infraco shall subject to Clauses 76.17, 76.18, 76.19A, 76.19B, 76.19C, 76.19 and 76.30 at its own cost rectify such loss or damage so that the Infraco Works conform in every respect, subject to Clause 76, with the provisions of this Agreement.

31.4 The Infraco shall take full responsibility for the care of the Trams and Tram Related Equipment from the Commencement Date until, in relation to each Tram and item of Tram Related Equipment, the date of issue of a Certificate Tram Commissioning in relation to that Tram.

31.5 In relation to each Tram and item of Tram Related Equipment from the date of issue of a Certificate of Tram Commissioning in relation to that Trams the Infraco shall comply with the provisions of Clause 52 (*Maintenance*).

31.6 In the event of any loss or damage to the Trams or the Tram Related Equipment while the Infraco is responsible for the care thereof in the terms of Clause 31.4, the Infraco shall, subject to Clause 76.17, 76.18, 76.19A, 76.19B, 76.19C, 76.19 and 76.30 at its own cost rectify such loss or damage so that the Trams or the Tram Related Equipment conform in every respect with the provisions of this Agreement. For avoidance of doubt, the Infraco shall have no responsibility in connection with damage to the Trams or Tram Related Equipment which is caused by vandalism occurring after the date of delivery to the Depot and the relevant Certificate of Tram Commissioning.

32. INTERFERENCE WITH TRAFFIC AND ADJOINING PROPERTIES

- 32.1 The Infraco shall comply with the requirements of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) with regard to the maintenance of access to properties, bus stops and bus services and the closure of roads.
- 32.2 The Infraco shall at all times seek to minimise any nuisance or inconvenience to or interference with the business or operations of the owners, tenants or occupiers of the Site or other premises upon or in the locality of the Site, to all bus operations and to the public generally, including measures to reduce the nuisance from noise, dust, smell, fumes and vibration during the carrying out of the Infraco Works. The Infraco shall comply with the requirements of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) in this regard.

33. AVOIDANCE OF DAMAGE TO ROADS AND BRIDGES

- 33.1 The Infraco shall use every reasonable means to prevent any of the roads or bridges communicating with or on the route to the Site from being subjected to extraordinary traffic within the meaning of the Roads (Scotland) Act 1984 by any traffic of the Infraco or any Infraco Party. In particular, the Infraco shall select routes and use vehicles and restrict and distribute loads so that any such extraordinary traffic as will inevitably arise from the moving of the Infraco's Equipment and materials or manufactured or fabricated articles from and to the Site shall be limited as far as reasonably possible and so that no unnecessary damage or injury may be occasioned to such roads and bridges.
- 33.2 The Infraco shall be responsible for and shall pay the cost of strengthening any bridges or altering or improving any road communicating with or on the route to the Site to facilitate the delivery of the Trams by the Tram Supplier and the installation of the Infraco's Equipment or Temporary Works required in the carrying out of the Infraco Works. Subject to Clauses 77.3, 77.7 and 77.8, the Infraco shall indemnify and keep indemnified **tie** against all claims for damage to any road or bridge communicating with or on the route to the Site caused by such movement including such claims as may be made by any competent authority directly against **tie** and/or CEC pursuant to any Law or other statutory instrument and shall negotiate and pay all claims arising solely out of such damage.
- 33.3 If, notwithstanding Clause 33.1, any damage occurs to any bridge or road communicating with or on the route to the Site arising from the delivery of the Trams by the Tram Supplier, materials or manufactured or fabricated articles being or intended to form part of the Infraco Works and/or the Temporary Works, the Infraco shall notify **tie's** Representative as soon as

the Infraco becomes aware of such damage or as soon as the Infraco receives any claim from the authority entitled to make such claim. **tie** shall not be liable for any costs, charges or expenses in respect thereof in relation thereto.

34. WORK TO BE TO SATISFACTION OF TIE

34.1 The Infraco shall construct and complete the Infraco Works in strict accordance with this Agreement and shall comply with and adhere strictly to **tie** and **tie's** Representative's instructions on any matter connected therewith (whether mentioned in this Agreement or not) provided that such instructions are given in accordance with the terms of this Agreement and will not cause Infraco to be in breach of this Agreement. The Infraco shall take instructions only from **tie**, **tie's** Representative, subject to Clause 25.8, from **tie's** Representative's duly appointed delegate or the Operator or Operator's Representative in accordance with 17.10.

34.2 The whole of the materials, Infraco's Equipment and labour to be provided by the Infraco under Clause 7 (*Duty of Care and General Obligations in Relation to the Infraco Works*) and the mode, manner and speed of construction of the Infraco Works are to be in accordance with this Agreement.

34.3 If in pursuance of Clause 34.1 (including for the avoidance of doubt any instructions of **tie's** Representative, of **tie's** Representative's duly appointed delegate or of the Operator or Operator's Representative in accordance with 17.10 deemed to have been given pursuant or in accordance with Clause 34.1), **tie's** Representative shall issue instructions which involve the Infraco in delay or disrupt its arrangements or methods of construction or so as to cause the Infraco to incur cost then such instructions shall be a Compensation Event under Clause 65 (*Compensation Events*) except to the extent that either such instructions have been required as a consequence of the Infraco's breach of its obligations under this Agreement or such delay and/or extra cost result from the Infraco's default. If such instructions require any variation to any part of the Infraco Works, **tie** shall be deemed to have issued a **tie** Notice of Change requiring such variation, which **tie** Change shall be a Mandatory **tie** Change.

35. QUALITY OF MATERIALS AND WORKMANSHIP, SAMPLES AND TESTS

35.1 Save in relation to the Tram Supply Obligations and Tram Maintenance Services all materials and workmanship shall be the respective kinds described in this Agreement or where the Agreement is silent, to the standard proposed by the Infraco and reviewed in accordance with Schedule Part 14 (*Design Review and Design Management Plan*). Save in relation to the Tram Supply Obligations and Tram Maintenance Services all materials and workmanship shall be subjected to such tests as may be specified in this Agreement at the place of manufacture or

fabrication or preparation or on the Site or such other place or places. The Infraco shall undertake such testing and provide such assistance, instruments, machines, stores, labour and materials as are normally required for examining, measuring and testing any work and the quality, weight or quantity of any materials used, and shall supply samples of materials before incorporation or use in the Infraco Works for testing as may be selected and required by this Agreement, provided that in relation to the Tram Supply Obligations and Tram Maintenance Services all such materials and workmanship shall be the respective kinds and described and shall be subjected to such tests as may be specified in the Tram Supply Agreement and Tram Maintenance Agreement respectively.

35.2 All samples shall be supplied by the Infraco at its own cost.

35.3 The costs of making any test identified in this Agreement shall be borne by the Infraco. Subject to Clauses 36 and 35.4, in the event that the Infraco is required in accordance with Clause 35.1 to undertake any test which is not identified in this Agreement but is required by **tie**, the requirement to undertake such test shall be a **tie** Change.

35.4 In the event that the Infraco is required in accordance with Clause 35.1 to undertake any test which is not identified in this Agreement but is required by **tie** as a result of a breach by the Infraco of its obligations under this Agreement, then the costs of making such test shall be borne by the Infraco.

36. EXAMINATION OF WORK BEFORE COVERING UP

36.1 Save in relation to the Tram Maintenance Services and the Tram Supply Obligations, no work shall be covered up or put out of view without the consent of **tie's** Representative (acting reasonably), and the Infraco shall afford full opportunity for **tie's** Representative and any other parties authorised by **tie** to examine any work which is about to be covered up or put out of view and to examine foundations before permanent work is placed thereon. Save in respect of unscheduled or reactive maintenance, the Infraco shall give no less than 48 hours notice to **tie's** Representative whenever any such work or foundations are ready or about to be ready for examination and **tie's** Representative shall within 48 hours of such notice, unless he considers it unnecessary and advises the Infraco accordingly, attend for the purpose of examining such work or of examining such foundations.

36.2 Save in relation to the Tram Maintenance Services and the Tram Supply Obligations, the Infraco shall uncover any part or parts of the Infraco Works or make openings in or through the same as **tie's** Representative may from time to time direct and shall reinstate and make good such part or parts to the satisfaction of **tie's** Representative (acting reasonably). If any

such part or parts have been covered up or put out of view after compliance with the requirements of Clause 36.1 and are found to have been carried out in accordance with the Agreement, the cost of uncovering, making openings in or through, reinstating and making good the same shall be borne by **tie** and Infraco will be entitled to include such costs in its next application for payment but in any other case all such costs shall be borne by the Infraco.

37. REMOVAL OF UNSATISFACTORY WORK AND MATERIALS

37.1 Save in relation to the Tram Supply Obligations and Tram Maintenance Services **tie's** Representative shall during the progress of the Infraco Works have power to instruct in writing:

37.1.1 the removal from the Site within such reasonable time or times specified in the instruction, of any materials which are not in accordance with the Agreement ; and/or

37.1.2 substitution of such materials with materials in accordance with the Agreement ; and/or

37.1.3 the removal and proper replacement (notwithstanding any previous test thereof or interim payment therefor) of any work which in respect of:

37.1.3.1 materials or workmanship; or

37.1.3.2 design by the Infraco for which the Infraco is responsible;

is not in accordance with the Agreement . After consultation with the Infraco and with the agreement of **tie**, **tie's** Representative may allow all or any of such materials, workmanship or design to remain and confirm this in writing to the Infraco (which shall not constitute a **tie** Change under Clause 80 (**tie Changes**)) and in which case the use of such materials in accordance with this Agreement shall not be a breach of this Agreement.

37.2 In the case of default on the part of the Infraco in carrying out such instruction, **tie** shall be entitled to carry out or procure the carrying out of such instruction, and all costs and expenses properly incurred by **tie** in relation to such default shall be recoverable from the Infraco by **tie** and may be deducted by **tie** from any monies due or to become due to the Infraco.

37.3 Failure of **tie** or **tie's** Representative to disapprove any work or materials shall not prejudice the power of **tie** or **tie's** Representative subsequently to take action under this Clause 37 (*Removal of Unsatisfactory Work and Materials*).

- 37.4 If any workmanship or materials are not in accordance with this Agreement, **tie's** Representative may issue such orders or directions under Clauses 35 (*Quality of Materials and Workmanship, Samples and Tests*) or Clause 36 (*Examination of Work Before Covering Up*) to test or open up for inspection as are reasonable in the circumstances to establish the likelihood or extent, as appropriate to the circumstances, of any further similar non-compliance.
- 37.5 To the extent that such orders or directions issued pursuant to Clause 37.4 are as a result of previous and repeated non-compliance, whatever the result of the test or opening up, and notwithstanding Clauses 35.3, 36.2 and 48 (*Infraco to Search*), the cost of such test or opening up and the cost of reinstatement shall be borne by the Infraco. The orders or directions shall not constitute **tie** Changes under Clause 80 (**tie** Changes) but shall, unless the test or inspection showed that the workmanship or materials were not in accordance with the Agreement, be a Relief Event under Clause 64 (*Relief Events*).

38. URGENT REPAIRS AND EMERGENCIES

- 38.1 In accordance with the provisions of paragraph 6 of parts A and B of Schedule 3 (*Code of Construction Practice and Code of Maintenance Practice*), if, in the opinion of **tie's** Representative (acting reasonably), any remedial or other work or repair is necessary by reason of any emergency, accident or failure or other event giving rise to an immediate threat to health and safety (including users and/or members of the public) during the carrying out of the Infraco Works, **tie's** Representative shall so inform the Infraco with confirmation in writing.
- 38.2 Thereafter, if the Infraco is unable or unwilling to carry out such work or repair in accordance with the appropriate time period identified in paragraph 6 of parts A and B of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*), **tie** may itself carry out or procure the carrying out of the said work or repair.
- 38.3 If the work or repair so carried out by **tie** is work which the Infraco was liable to carry out at its own expense under the Agreement, all costs and expenses properly incurred by **tie** in relation to such work shall be recovered from the Infraco by **tie** and may be deducted from any monies due or to become due to the Infraco.
- 38.4 If the Infraco carries out such work or repair, the Infraco shall be paid in accordance with Clause 67 (*Payment in Respect of Applications for Milestone Payments*) or Clause 68 (*Payment in Respect of Maintenance Services*) the amount of any direct and demonstrable costs as may be reasonable except to the extent that such extra cost results from the Infraco's default.

39. FOSSILS AND ANTIQUITIES

39.1 All fossils, EAL Artefacts, antiquities, and other objects having artistic, historic or monetary value and human remains which may be found on or at the Site are or shall become, upon discovery, the absolute property of CEC or, in the case of the EAL Artefacts, EAL.

39.2 Upon discovery of any such item during the course of the Infraco Works, the Infraco shall:

39.2.1 immediately inform **tie's** Representative of such discovery;

39.2.2 take all steps not to disturb the object and, if necessary, cease any Infraco Works in so far as the carrying out of such Infraco Works would endanger the object or prevent or impede its excavation; and

39.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.

39.3 **tie** shall procure that **tie's** Representative promptly, and in any event within 3 Business Days of notice being given by the Infraco pursuant to Clause 39.2.1, issues an instruction to the Infraco specifying what action **tie's** Representative requires the Infraco to take in relation to such discovery.

39.4 The Infraco shall promptly and diligently comply with any instruction issued by **tie's** Representative referred to in Clause 39.3 and such instruction shall be a **tie** Change and Clause 80 (**tie** Changes) shall apply.

39.5 If directed by **tie's** Representative, the Infraco shall allow representatives of **tie** to enter the Site for the purposes of removal or disposal of such discovery provided that such entry shall be subject to **tie** complying with all relevant safety procedures, which shall include the Infraco's site rules and any reasonable directions with regard to site safety that may be issued by or on behalf of the Infraco's Representative from time to time.

40. ERRORS AND/OR OMISSIONS IN THE INFRACO WORKS

40.1 Subject to the limitation in respect of the duration of Infraco's liability for Patent Defects and latent defects under this Agreement if during the carrying out of the Infraco Works and/or where the Infraco has completed the Infraco Works, **tie** becomes aware of any error or omission in the carrying out of the Infraco Works or of any other breach of this Agreement by Infraco (except where such error, omission or breach has been caused by a Notified Departure, Compensation Event, Relief Event or **tie** Change in relation to the element of the works

affected by such Notified Departure, Compensation Event or Relief Event) **tie** shall notify the Infraco, who shall, at its own expense and in liaison with **tie**, rectify any error or omission or breach, or where this is agreed by **tie** to be impracticable or undesirable, take such other agreed steps to address the error or omission.

- 40.2 Any reasonable and demonstrable direct costs to **tie** associated with the Infraco remedying any such errors or omissions or breaches shall be paid by the Infraco to **tie**.
- 40.3 These arrangements shall in no respect diminish **tie's** ability to recover damages from the Infraco for losses incurred by **tie** consequent upon the error or omission or breach in question.
- 40.4 If and to the extent that the Infraco fails to carry out the necessary rectification and/or other agreed steps in accordance with Clause 40.1 to **tie's** reasonable satisfaction and/or within a reasonable period of time, **tie** shall be entitled to carry out such rectification and/or other agreed steps itself, or procure the carrying out by a third party of such rectification and/or other agreed steps at the Infraco's expense and shall recover any costs from the Infraco as a debt.

PART 8 - MILESTONE COMPLETION, TESTING AND COMMISSIONING

41. COMPLETION OF CONSTRUCTION MILESTONES AND CRITICAL MILESTONES

- 41.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the date upon which the Infraco considers that any of the Construction Milestones or Critical Milestones will be achieved and the associated tests to be undertaken in accordance with the Employer's Requirements carried out. **tie's** Representative shall be entitled to inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 41.1, and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection. If **tie's** Representative does not in accordance with this Clause 41.1 attend any tests, or does not carry out an inspection on the date or dates specified by the Infraco in Infraco's notice he shall be entitled, upon giving reasonable notice to the Infraco, to specify a new date or dates for his attendance at such tests or for the carrying out of such an inspection. **tie's** Representative's failure to attend such tests or to carry out such inspections (or rearranged inspections or tests) and the carrying out of such tests or inspections on the new dates notified by the **tie** Representative shall be a Compensation Event and Clause 65 shall apply.
- 41.2 Within 7 Business Days of any inspection made pursuant to Clause 41.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement

of the Construction Milestone or Critical Milestone and the repetition of any of the tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before the relevant Construction Milestone or Critical Milestone will have been achieved in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 41.1 (but dealing only with matters raised in the notification under this Clause 41.2) so that the procedures in Clause 41.1 and this Clause 41.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Construction Milestone or Critical Milestone are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.

- 41.3 The Infraco shall notify **tie** when a Construction Milestone or a Critical Milestone has been achieved in accordance with this Agreement and **tie's** Representative shall issue the relevant Construction Milestone Completion Certificate or Critical Milestone Completion Certificate (as appropriate) to that effect stating the date upon which the Construction Milestone or Critical Milestone was achieved. The issue of a Construction Milestone Completion Certificate or Critical Milestone Completion Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Construction Milestone or Critical Milestone have been achieved on the date stated in such certificate.

42. COMPLETION AND CERTIFICATION OF TRAM MILESTONES

- 42.1 The Tram Milestones are as shown in Schedule 5 to the Tram Supply Agreement and as shown in the Programme.
- 42.2 Certification of tram vehicle delivery and tram vehicle commissioning and testing shall be carried out as stipulated pursuant to the Tram Supply Agreement. The issue of a Certificate of Tram Delivery and issue of a Certificate of Tram Commissioning by the Tram Inspector shall be deemed to be certification of the achievement of the relevant Construction Milestone or Critical Milestone under the Infraco Contract. The Tram Mobilisation Milestone shall be deemed to have been achieved on signature of the Tram Supply Agreement. All other Tram Milestones as set out in Schedule 5 to the Tram Supply Agreement and the Tram Maintenance Mobilisation Milestones will be certified as complete jointly by Infraco and the **tie** Representative when the activities referred to are complete in accordance with the Tram Supply Agreement and the Tram Maintenance Agreement and such certification shall be deemed to be achievement of a relevant Construction Milestone or Critical Milestone under the Infraco Contract.

43. TRAM INSPECTOR

43.1 NOT USED.

43.2 NOT USED

43.3 NOT USED.

43.4 Neither **tie** nor the Infraco shall, without the other's prior written approval (not to be unreasonably withheld or delayed):

43.4.1 terminate, repudiate or discharge the Tram Inspector Agreement or treat the same as having been terminated, repudiated or otherwise discharged;

43.4.2 waive, settle, compromise or otherwise prejudice any rights or claims which the other may from time to time have against the Tram Inspector; or

43.4.3 vary the terms of the Tram Inspector Agreement or the service performed or to be performed by the Tram Inspector.

43.5 The Parties shall comply with and fulfil their respective duties and obligations arising under the Tram Inspector Agreement.

43.6 The Parties agree to co-operate with each other generally in relation to all matters within the scope of or in connection with the Tram Inspector Agreement. All instructions and representations issued or made by either of the Parties to the Tram Inspector shall be simultaneously copied by that Party to the other and both Parties shall be entitled to attend all inspections undertaken by or meetings involving the Tram Inspector Agreement.

43.7 In the event of the Tram Inspector's appointment being terminated otherwise than following full performance, the Parties shall liaise and co-operate with each other in order to appoint a replacement consultant to act as the Tram Inspector as soon as reasonably practicable. The identity of any such replacement shall be as agreed by the Parties and the terms of his appointment shall, unless otherwise agreed, be as set out in the Tram Inspector Agreement.

43.8 In the event that, pursuant to Clause 43.7, it is necessary to appoint a replacement consultant, the Parties shall as soon as reasonably practicable, in compliance with all Law relating to procurement which is applicable to either Party, appoint a suitably qualified and experienced consultant to act as the Tram Inspector for the purpose of this Agreement.

43.9 In the event that the Parties fail to agree the identity and/or terms of a replacement Tram Inspector in accordance with Clause 43.7, within 60 days of the previous Tram Inspector's appointment being terminated, then either Party may refer the matter for determination under the Dispute Resolution Procedure.

43.10 **tie** shall be responsible for the cost of the appointment and services of the Tram Inspector.

44. NOTIFICATION OF SECTIONAL COMPLETION OF SECTIONS A, B, C AND D

44.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the dates when the relevant Systems Acceptance Tests are to be carried out and the date upon which the Infraco considers that each of Section A, Section B, Section C and Section D will be substantially completed, commissioned and will have satisfactorily passed the relevant Systems Acceptance Tests. **tie's** Representative shall inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 44.1 and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.

44.2 Within 7 Business Days of any inspection made pursuant to Clause 44.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the relevant System Acceptance Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before the Section will have been substantially completed, tested and commissioned in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 44.1 (but dealing only with matters raised in the notification under this Clause 44.2) so that the procedures in Clause 44.1 and this Clause 44.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to the Section are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.

44.3 When a Section has been substantially completed, tested and commissioned in accordance with this Agreement, **tie's** Representative shall issue a Certificate of Sectional Completion to that effect stating the date upon which, the Section was substantially completed, tested and commissioned provided always that a Certificate of Sectional Completion shall not be issued:

44.3.1 in respect of Section B, unless a Certificate of Sectional Completion has already been issued in respect of Section A, except where **tie**, acting reasonably, decides otherwise;
and

- 44.3.2 in respect of Section C, unless a Certificate of Sectional Completion has already been issued in respect of both Section A and Section B; and
- 44.3.3 in respect of Section D, unless a Certificate of Sectional Completion has been already issued in respect of Section A, Section B and Section C.
- 44.4 The issue of a Certificate of Sectional Completion shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Sectional Completion Date has occurred on the date stated in such certificate.
- 44.5 **tie** shall be entitled to apply a retention of 10% of any Milestone Payment payable on the issue of any Certificate of Sectional Completion for Sections A, B and C, if **tie** is not satisfied that all Consents (other than **tie** Consents) relating to the installation of the Infraco Works relevant to each Section have been obtained, are in full force and effect and are unconditional to the extent practicable at the particular stage of the Infraco Works, (unless where a Consent is conditional, such condition relates only to the passage of time) until such time as such Consents have been obtained.
- 44.5A The issue of the Certificate of Section Completion for Section D pursuant to Clause 45.3 (*Notification of Service Commencement*) shall be conditional upon **tie** being satisfied that all Design Stage Consents and Construction or Maintenance Stage Consents relating to the issue of the Certificate of Section Completion and required to enable **tie** to legally commence full operation of Edinburgh Tram Network for passenger service (the "**Necessary Consents**") have been obtained by the Infraco and are in full force and effect and are unconditional to the extent practicable at the particular stage of the Infraco Works or, if conditional, such conditionality relates only to the passage of time before the Necessary Consents comes into full force and effect.
- The absence of any Necessary Consents (save for the reasons above) shall entitle **tie** to apply a retention of 10% of the relevant Milestone Payment until the Infraco has obtained all such outstanding Necessary Consents.
- 44.6 For the purposes of this Clause 44 (*Notification of Sectional Completion of Sections A, B, C and D*), 'substantial completion' shall mean successful testing and commissioning of the Section in accordance with the relevant System Acceptance Tests and the provision of all relevant documents all in accordance with Schedule Part 2 (*Employer's Requirements*). **tie's** Representative may at his absolute discretion issue a Certificate of Sectional Completion notwithstanding that minor items of work ("**Snagging**") and, in relation to the issue of a Certificate of Sectional Completion for Section D, Patent Defects remain to be completed, in

which event such incomplete work and/or commissioning and/or adjustment shall be completed by the Infraco in accordance with the provisions of Clause 46 (*Snagging and Patent Defects*). **tie** shall identify any such Snagging on a Snagging List.

45. NOTIFICATION OF SERVICE COMMENCEMENT

- 45.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the date upon which the Infraco considers that Section D will be substantially completed, commissioned and will have satisfactorily passed the Systems Acceptance Tests. **tie's** Representative shall inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 45.1 and to attend any of the tests to be carried out. The Infraco shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.
- 45.2 Within 7 Business Days of any inspection made pursuant to Clause 45.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the Systems Acceptance Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before Section D will have been substantially completed, tested and commissioned in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 45.1 (but dealing only with matters raised in the notification under this Clause 45.2) so that the procedures in Clause 45.1 and this Clause 45.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to Section D are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.
- 45.3 When Section D has been substantially completed, tested and commissioned in accordance with this Agreement, **tie's** Representative shall issue a Certificate of Service Commencement to that effect stating the date upon which, Section D was substantially completed, tested and commissioned provided always that a Certificate of Service Commencement shall not be issued until **tie** has issued to the Infraco a Certificate of Sectional Completion in relation to each of Section A, Section B, Section C and Section D.
- 45.4 The issue of a Certificate of Service Commencement shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that the Service Commencement Date has occurred on the date stated in such certificate.

45.5 For the purposes of this Clause 45 (*Notification of Service Commencement*), 'substantial completion' shall mean successful testing and commissioning of Section D in accordance with T1, T2 and T3, the provision of all required Spare Parts, relevant documents and that the maintenance staff have been trained, all in accordance with Schedule Part 2 (*Employer's Requirements*). **tie's** Representative may at his absolute discretion issue a Certificate of Service Commencement notwithstanding that Snagging and Patent Defects remain to be completed, in which event such incomplete work and/or commissioning and/or adjustment shall be completed by the Infraco in accordance with the provisions of Clause 46 (*Snagging*). **tie** shall identify any such Snagging on a Snagging List.

46. SNAGGING AND PATENT DEFECTS

46.1 Any Snagging on a Snagging List shall be completed by the Infraco within 20 Business Days of receipt by the Infraco of such Snagging List. The scheduling of carrying out of Snagging shall be agreed between the Infraco and **tie** (in consultation with the Operator if appropriate) and if the Snagging cannot be completed within the said 20 Business Days, then **tie** (acting reasonably and taking into account long lead times) shall determine a longer period to enable completion.

46.2 All Snagging shall be carried out by the Infraco, at its own expense. In so far as this creates additional workload or support from the Operator, then any reasonable, direct costs associated with such additional workload or support shall be paid by the Infraco.

46.3 Save where prevented from doing so by reason of a Relief Event or a Compensation Event, or as otherwise agreed in writing with **tie**, if the Infraco fails to carry out any such Snagging in accordance with the agreed schedule, **tie** shall, by giving 5 days written notice, be entitled to carry out that Snagging itself or by using other contractors and **tie** shall be entitled to recover all reasonable direct costs and expenses properly incurred by **tie** in relation to such work from the Infraco and **tie** may deduct the same from any monies that are or may become due to the Infraco. For the avoidance of doubt, this shall not provide any relief to the Infraco from any liability of this Agreement.

46.4 When all Snagging has been completed, **tie's** Representative shall issue to the Infraco a Snagging Rectification Certificate stating the date on which the Infraco shall have completed its obligations to carry out such Snagging

46.5 Save as provided for under Clauses 46.6 to 46.9, the issue of a Snagging Rectification Certificate shall not be taken as relieving the Infraco from any liability arising out of or in any

way connected with the performance of its obligations under the Agreement other than in respect of Snagging.

- 46.6 The Infraco's liability in respect of Patent Defects related to any design, construction, installation and maintenance of the Infraco Works which took place prior to the issue of the Service Commencement Certificate shall cease upon the issue by **tie** of the Patent Defects Rectification Certificate pursuant to Clause 46.9 or when the Infraco shall have made all payments due pursuant to Clause 46.8 below.
- 46.7 The Infraco's liability in respect of Patent Defects which arise as a result of the carrying out of the Maintenance Services after the Service Commencement Date shall cease in accordance with Clause 96.7.
- 46.8 If any Patent Defects as mentioned in Clause 46.6 are identified by **tie** within the Patent Defect Notification Period such Patent Defects shall be notified by **tie** to the Infraco in a schedule of defects which **tie** shall deliver to the Infraco not later than 14 days prior to the expiry of the Patent Defect Notification Period.
- 46.9 The Infraco shall remedy any Patent Defects notified in accordance with this Clause 46.8 within a reasonable time after receipt of such schedule of defects notified by **tie** in accordance with Clause 46.8. Should the Infraco fail to remedy such Patent Defects **tie** may, upon giving 20 Business Days notice to the Infraco, carry out or engage other contractors to carry out the necessary remedial works and **tie** shall be entitled to recover all reasonable direct costs and expenses properly incurred from the Infraco and Clause 46.6 shall apply.
- 46.10 Within 10 Business Days of all Patent Defects which **tie** have required to be made good under Clause 46.8 having been made good, **tie** shall issue a Patent Defects Rectification Certificate which certificate shall be conclusive evidence that the Patent Defects to which such certificate applies to have been made good.
- 46.11 In the event of termination for any reason after Service Commencement Date, the provisions of Clause 95 (Transition on Termination or Expiry) and Clause 96 (Surveys Prior to Expiry Date) shall apply in relation to the Infraco's liability for Patent Defects.

47. ISSUE OF NETWORK CERTIFICATE AND RELIABILITY CERTIFICATE

- 47.1 The Infraco shall give **tie's** Representative not less than 14 Business Days notice of the dates when Systems Acceptance Tests T4 and T5 are to be carried out. **tie's** Representative shall inspect the Infraco Works on the date or dates reasonably specified by the Infraco in accordance with this Clause 47.1 and to attend any of the tests to be carried out. The Infraco

shall procure that such of its staff as **tie** may reasonably request shall accompany **tie's** Representative on any such inspection.

- 47.2 Within 7 Business Days of any inspection made pursuant to Clause 47.1, **tie's** Representative shall notify the Infraco of any outstanding matters (including further evidence of achievement of Systems Acceptance Tests T4 and T5 (as appropriate) and the repetition of Systems Acceptance Tests T4 and T5 (as appropriate) which must be attended to before Systems Acceptance Tests T4 and T5 (as appropriate) can be considered to have been passed in accordance with this Agreement. The Infraco shall attend to all such matters and shall, if necessary, give **tie** further notices in accordance with Clause 47.1 (but dealing only with matters raised in the notification under this Clause 47.2) so that the procedures in Clause 47.1 and this Clause 47.2 are repeated as often as may be necessary to ensure that all outstanding matters in relation to Systems Acceptance Tests T4 and T5 (as appropriate) are attended to. Conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of the Infraco.
- 47.3 When Systems Acceptance Test T4 has been passed in accordance with this Agreement, **tie's** Representative shall issue a Network Certificate to that effect stating the date upon which Systems Acceptance Test T4 was passed. The issue of a Network Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that Systems Acceptance Test T4 was passed on the date stated in such certificate.
- 47.4 When it is satisfied that Systems Acceptance Test T5 has been passed in accordance with this Agreement, **tie's** Representative shall issue a Reliability Certificate to that effect stating the date upon which, in its opinion, Systems Acceptance Test T5 was passed. The issue of a Reliability Certificate shall, in the absence of manifest error, bad faith or fraud, be conclusive evidence for the purpose only of ascertaining that Systems Acceptance Test T5 was passed on the date stated in such certificate.
- 47.5 For the avoidance of doubt, the issue of a Network Certificate and/or Reliability Certificate pursuant to this Clause 47.5 shall be conditional upon **tie** being satisfied that all Construction and Maintenance Stage Consents required for the issue of a Network Certificate and/or Reliability Certificate have been obtained, are in full force and effect and are unconditional save in circumstances where Clause 19.17 applies.

48. INFRACO TO SEARCH

- 48.1 The Infraco shall, if required by **tie's** Representative in writing during the carrying out of the Infraco Works, carry out such surveys, searches, tests or trials as may be necessary to

determine the cause of any defect or fault under the directions of **tie's** Representative. Unless the defect or fault is one for which the Infraco is liable under the Agreement, the cost of the surveys, searches, tests or trials carried out by the Infraco as aforesaid shall be borne by **tie**. If the defect or fault is one for which the Infraco is liable, the cost of the surveys, searches, tests or trials carried out as aforesaid shall be borne by the Infraco and the Infraco shall in such case repair, rectify and make good such defect or fault at its own expense.

49. NON-REMOVAL OF MATERIALS AND CONTRACTOR'S EQUIPMENT

- 49.1 Save where provided for in the Maintenance Plan, no Trams, engineers works vehicles, Spare Parts, Special Tools, Infraco's Equipment, Temporary Works, materials for Temporary Works or other goods or materials owned by the Infraco and brought on to the Site for the purposes of the Agreement and which continue to be required for the execution and completion of the Infraco Works shall be removed without the written consent of **tie's** Representative (which consent shall not unreasonably be withheld) except where the removal of any such items from Site concerns items belonging to a sub-contractor no longer engaged in the performance of the Infraco Works, in which case the Infraco shall be responsible for ensuring that the removal has no adverse effect on the progress of the Infraco Works or on the performance of its obligations under this Agreement.
- 49.2 Subject to the exception set out in Clause 77.2, and subject to Clauses 52.17 and 76, **tie** shall not at any time be liable for the loss of or damage to any Trams, engineers works vehicles, Spare Parts, Special Tools, Infraco's Equipment, Temporary Works, goods or materials.
- 49.3 Save where required for Maintenance Services, if the Infraco fails to remove any of the said Infraco's Equipment, Temporary Works, goods or materials in accordance with Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) from a Section within such reasonable time after the issue of a Certificate of Sectional Commencement in respect of that Section as **tie's** Representative may allow, then **tie** may sell or otherwise dispose of such items. From the proceeds of the sale of any such items, **tie** shall be entitled to retain any costs or expenses incurred in connection with their sale and disposal before paying the balance (if any) to the Infraco.

PART 9 - SAFETY

50. CDM REGULATIONS 2007

- 50.1 In this Clause 50 (*CDM Regulations 2007*):

"**Regulations**" means the Construction (Design and Management) Regulations 2007 or any statutory re-enactment or amendment thereof for the time being in force;

"**CDM Coordinator**" and "**Principal Contractor**" mean the persons so described in the Regulations;

"**Health and Safety File**" means the file prepared by virtue of regulation 20(2) of the Regulations.

50.2 The terms used in this Clause 50 shall have the meaning ascribed to them in the Regulations unless the context otherwise requires.

50.3 Where and to the extent that the Regulations apply to the Infraco Works:

50.3.1 Turner & Townsend Management Solutions Limited is appointed CDM Coordinator and shall discharge the responsibilities and functions of a CDM Coordinator in terms of the Regulations in relation to the Infraco Works; and

50.3.2 the Infraco is appointed Principal Contractor in respect of the Infraco Works and shall discharge the responsibilities and functions of a Principal Contractor in terms of the Regulations in relation to the Infraco Works.

50.4 In relation to the Infraco Works, Infraco warrants and undertakes that:

50.4.1 it is competent to perform the duties imposed on it by the Regulations;

50.4.2 it has performed and fulfilled and will continue to perform and fulfil the duties imposed on it by the Regulations, in its capacity as the Principal Contractor;

50.4.3 it has allocated and will continue to allocate adequate resources to ensure that it performs and fulfils its duties under the Regulations properly; and

50.4.4 it has not started and will not start any construction work until a construction phase plan, in terms of the Regulations, has been prepared.

50.5 Any action under the Regulations taken by either the CDM Coordinator or the Principal Contractor and in particular any alteration or amendment to the Health and Safety File shall be deemed to be a **tie's** Representative's instruction pursuant to Clause 34 (*Work to be to Satisfaction of tie*) provided that the Infraco shall in no event be entitled to any additional payment and/or extension of time in respect of any such action to the extent that it results from any action, lack of action or default on the part of the Infraco.

- 50.6 If any such action of either the CDM Coordinator or the Principal Contractor could not in the Infraco's opinion reasonably have been foreseen by an experienced contractor the Infraco shall as early as practicable give written notice thereof to **tie's** Representative.
- 50.7 The Infraco shall continue to carry out its role as Principal Contractor in respect of the Infraco Works, notwithstanding that any other works are being carried out at the same time as the Infraco Works.
- 50.8 The Infraco shall provide any information required by the CDM Coordinator in relation to the CDM Regulations within 3 Business Days (where reasonably practicable), or such other period as may be agreed, of any request, or sooner where reasonably practicable (for the avoidance of doubt, this does not affect **tie's** responsibility in terms of the Regulations, to provide the pre-construction information).
- 50.9 Following the Service Commencement Date the Infraco shall comply with the Health and Safety File.

51. NOTICE OF ACCIDENTS AND LIAISON WITH THE EMERGENCY SERVICES

- 51.1 In the event of any notifiable accident or dangerous occurrence connected with the carrying out of the Infraco Works, the Infraco shall be responsible for reporting a notifiable accident or dangerous occurrence to **tie** and to the Health and Safety Executive or to the ORR (as the case may be in accordance with the Memorandum of Understanding between the Health and Safety Executive and ORR dated 1 April 2006) under the Reporting of Injuries and Diseases and Dangerous Occurrences Regulations 1995, unless the notifiable accident or dangerous occurrence is otherwise reported by an employer of workers on Site with a duty under the Reporting of Injuries and Diseases and Dangerous Occurrences Regulations 1995 to report accidents in which its employees are injured.
- 51.2 The Infraco shall liaise regularly with the Emergency Services, during the design, construction, testing and commissioning, operation and maintenance of the Edinburgh Tram Network. In particular, such regular liaison will include:
- 51.2.1 notification and clearance for temporary traffic management arrangements;
 - 51.2.2 Edinburgh Tram Network design and implementation; and
 - 51.2.3 the supply by the Infraco of training to a reasonable number of personnel of the Emergency Services (to be provided by the Infraco free of charge) to effect rescue procedures during construction, operation and maintenance.

PART 10 - MAINTENANCE SERVICES

52. MAINTENANCE

- 52.1 In relation to each Section, from the date of issue of a Certificate of Sectional Completion in relation to that Section and in relation to Trams, from the Tram Maintenance Commencement Date, the Infraco shall carry out all maintenance, repair, renewals and remedial works to the Edinburgh Tram Network as is necessary:
- 52.1.1 to maintain the Edinburgh Tram Network in accordance with the Maintenance Programme and the Maintenance Plan;
 - 52.1.2 to ensure that all the requirements of the Maintenance Specification are met at all times;
 - 52.1.3 to comply with those Operator Procedures as may be agreed between the Parties from time to time and that apply to the Maintenance Services;
 - 52.1.4 ensure that **tie** is informed of any adverse impact of design, redesign or modification to the Infraco Works which is likely to have an adverse impact on maintenance effectiveness and subject to Clauses 80 (*tie Change*) and 81 (*Infraco Changes*) to prevent such design, redesign or modification being undertaken if requested to do so by **tie**;
 - 52.1.5 to ensure that no modification, maintenance or repair work to the Edinburgh Tram Network, Spare Parts or Special Tools within the scope of the Maintenance Services shall prejudice the Case for Safety;
 - 52.1.6 so as not to prejudice the health or safety of, or unreasonably interfere with the proper performance of the duties of the Infraco, the Operator, employees and third parties or otherwise expose the Infraco and/or **tie** to liability under the Health and Safety at Work etc. Act 1974 or the Transport and Works Act 1992 or any other legislation relating to health and safety;
 - 52.1.7 to maximise the extent to which the Edinburgh Tram Network is Available Infrastructure and the Trams are Available Trams and to minimise unplanned interruption to such availability;

- 52.1.8 to sustain the functionality of the component parts of Edinburgh Tram Network as built for a period not less than the relevant stipulated design life, if any, stipulated in the Employer's Requirements;
- 52.1.9 the Edinburgh Tram Network is handed back to **tie** on the Expiry Date or the Termination Date (whichever is earlier) in a condition consistent with the Infraco having complied with the requirements of this Clause 52 (*Maintenance*) provided that the Infraco shall not be in breach of this Clause 52.1.9 by reason of fair wear and tear or by reason of any work being required to which Clause 52.17 applies where there was not sufficient time between the damage occurring and the Expiry Date or Termination Date (as appropriate) to enable the Infraco to carry out such work; and
- 52.1.10 nothing in this Clause 52.1 shall impose any obligation on the Infraco to carry out any Operator Maintenance.
- 52.2 The Infraco shall work with the Operator to ensure the daily handover of the Edinburgh Tram Network to the Operator for operation which shall include the completion of a handover checklist confirming the extent to which the Edinburgh Tram Network is Available Infrastructure and the Trams are Available Trams.
- 52.3 The Infraco shall work with the Operator to ensure the daily handback of all or part of the Edinburgh Tram Network from the Operator to the Infraco following operation of the Edinburgh Tram Network and take into account any comments received from the Operator on the performance or condition of the Edinburgh Tram Network.
- 52.4 The Infraco shall carry out and complete the Infrastructure Maintenance Services in accordance with this Clause 52 (*Infrastructure Maintenance*) subject to its ability to sub-contract the Infrastructure Maintenance Services pursuant to Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).
- 52.5 The Infraco shall, during the Mobilisation Period, carry out or procure that the Mobilisation Services are carried out on or before the date for the appropriate Mobilisation Milestone .
- 52.6 The Infraco shall carry out (or shall procure the carrying out of) all Maintenance Services in a safe manner and so that the Edinburgh Tram Network is capable of being operated in a safe and efficient manner free from any unreasonable risk to the health and well being of persons using or maintaining it and free from any reasonably avoidable risk of pollution, nuisance, interference or hazard.

- 52.7 During the Term, the Infraco shall be responsible for, without limitation providing, employing and training all staff necessary to perform the Maintenance Services in accordance with this Agreement and the total cost of providing those staff, the Maintenance Services (including the total cost of providing Spare Parts and Special Tools) is included in the Contract Price.
- 52.8 During the Mobilisation Period, the Infraco shall be responsible for, without limitation, providing all staff necessary to perform the Mobilisation Services in accordance with this Agreement, and the total cost of providing the Mobilisation Services is included in the Contract Price.
- 52.9 The Maintenance Services shall comprise only materials and goods which are of satisfactory quality and unless otherwise agreed in writing, the Infraco shall supply only new materials and goods, save where existing materials and goods have been satisfactorily repaired or reused by the Infraco in accordance with Good Industry Practice and, where applicable, as permitted under the Maintenance Plan.

Spare Parts and Special Tools

- 52.10 The Infraco shall be responsible for the provision of all Spare Parts and Special Tools necessary or required for the Maintenance Services. All such Spare Parts shall meet the technical and safety requirements of the Maintenance Specification. Special Tools to be provided pursuant to this Clause 52.10 shall, as a fundamental condition of this Agreement, be provided with a valid certificate of calibration (where appropriate). The Infraco shall notify **tie** as soon as reasonably practicable after becoming aware of any breach of warranty or supply of defective Spare Parts and Special Tools by the Tram Supplier or Tram Maintainer.
- 52.11 The Infraco shall also ensure that throughout the term of this Agreement all Special Tools which require calibration or testing in order that they shall be fit for their intended purpose shall have a valid test and/or calibration certificate (where appropriate), and the Infraco shall give to **tie** within 5 Business Days of any request by **tie** a copy of the current test or calibration certificate (where appropriate).
- 52.12 The Infraco shall acquire adequate stocks of such Spare Parts and Special Tools to ensure that there is always a Minimum Spare Parts Pool at the Depot and, in any case, sufficient Spare Parts and Special Tools to enable the Infraco to carry out (or procure the carrying out of) the Maintenance Services in accordance with this Agreement and manage reorder levels and lead times such that the stock of Spare Parts or Special Tools are maintained at or above the level of the Minimum Spare Parts Pool.

52.13 NOT USED

52.14 Every Reporting Period, the Infraco and **tie** shall review the level of the Minimum Spare Parts Pool in light of the requirements for Spare Parts in delivering the Maintenance Services pursuant to this Agreement and the Infraco shall make recommendations to **tie** in relation to any adjustments to be made to the Minimum Spare Parts Pool either in relation to the extent of the Minimum Spare Parts Pool or the quantity of any of the Spare Parts required to meet the Minimum Spare Parts Pool. **tie** shall review the Infraco's recommendations and where necessary consult further with the Infraco as to the adequacy of the Minimum Spare Parts Pool in the light of ongoing maintenance pursuant to the Maintenance Services and, subject to Clause 52.12 and the Infraco having taken such steps as are possible to rectify the situation, if **tie**, in its absolute discretion, is of the opinion that it would be appropriate to vary the Minimum Spare Parts Pool then such variation shall be a **tie** Change and the terms of Clause 80 (**tie** Changes) shall apply.

Repairs

52.15 Subject to Clause 46, the Infraco shall effect the repair of all defects in, failures of or damage to the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment irrespective of cause. The Infraco shall effect all such repairs in a manner consistent with its obligations under this Agreement and in a manner which causes the minimum disruption to the operation of the Edinburgh Tram Network and to enable the Edinburgh Tram Network (excluding the Free Issue Fare Collection Equipment) to be Available Infrastructure and the Trams to be Available Trams.

52.16 The Infraco shall bear all of the costs of complying with Clause 52.15 to the extent that any damage to the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment is caused by:

52.16.1 a breach of this Agreement by the Infraco; and/or

52.16.2 NOT USED

52.16.3 any negligent act or negligent omission by the Infraco or any Infraco Party.

52.17 To the extent that any damage to the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment is not caused by:

52.17.1 a breach of this Agreement by the Infraco; and/or

52.17.2 NOT USED

52.17.3 any negligent act or negligent omission by the Infraco or any Infraco Party,

then **tie** shall bear the necessary, reasonable and demonstrable costs of the Infraco repairing such damage and any repairs in respect of such damage shall be a Mandatory **tie** Change and the terms of Clause 80 (**tie** *Changes*) shall apply.

52.18 All repairs to and replacements of the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment shall be carried out to a standard that restores the defective, failed or damaged part of the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment to a condition which meets the requirements of the Maintenance Specification (subject to normal wear and tear) and enables the Infraco to comply with its obligations under this Clause 52 (*Maintenance*).

52.19 Where necessary, the Infraco shall be entitled to carry out temporary repairs to the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment subject to obtaining the prior approval of HMRI, the Operator, **tie** and all appropriate regulatory authorities. All temporary repairs shall be fully repaired at the earliest opportunity and in any event as soon as reasonably practicable upon receipt of written notice from HMRI, **tie** or the Operator (as the case may be) stating that it no longer considers such temporary repairs to be safe and/or fit for their purpose.

52.20 In respect of any incident or failure affecting the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment, the Infraco shall provide such assistance, information and advice as the **tie** or Operator shall reasonably require, including such assistance as **tie** or Operator shall reasonably require in:

52.20.1 the Infraco attending the site of the occurrence to assess the cause of the problem, with a required response time of no more than 15 minutes between the hours of 6:01 am and 10:00 pm or 1 hour between the hours of 10:01 pm and 6:00 am from **tie's** or the Operator's request for attendance to a representative of the Infraco departing from the Depot or elsewhere to attend.

52.20.2 rectifying the problem where such rectification falls within the scope of the Maintenance Services;

52.20.3 implementing measures to overcome and/or mitigate the effect on operation of the Edinburgh Tram Network excluding the Free Issue Fare Collection Equipment;

52.20.4 implementing temporary repairs where such repairs fall within the scope of the Maintenance Services; and

52.20.5 recovering any part of the Edinburgh Tram Network (including the Trams but excluding the Free Issue Fare Collection Equipment) for repair (where such part of the Edinburgh Tram Network is moveable) where such repair falls within the scope of the Maintenance Services.

52.21 As soon as practicable following the completion of the repair, the Infraco shall prepare and provide a report which summarises the causes of such incident or failure and providing recommendations where applicable to avoid the repetition of such occurrence. To the extent that the incident or failure was not attributable to a breach of this Agreement by the Infraco or a negligent act or omission of the Infraco or any Infraco Party, the Infraco shall be entitled to recover the costs of complying with Clause 52.20 in accordance with Clause 52.17

52.22 Where the most efficient manner of dealing with such failure would be for repairs to be effected at the site of the failure, where such repairs fall within the scope of the Maintenance Services, the Infraco shall have available competent resources to carry out such repairs as can safely be carried out at the site.

52.23 If the Infraco reasonably believes or becomes aware that there is or may be:

52.23.1 a defect or in the case of reporting or control systems, an excess of alarms and fault annunciation in a Part which has been fitted in the Edinburgh Tram Network (including a Tram excluding the Free Issue Fare Collection Equipment) whether or not as part of the Maintenance Services; or

52.23.2 any other defect in relation to the Edinburgh Tram Network (including a Tram);

which may prejudice the safe or reliable operation of the Edinburgh Tram Network, the Infraco shall immediately on becoming aware of such defect notify **tie** and the Operator of such defect and provide a proposal as to the most effective course of action by which such defect can be rectified where such rectification falls within the scope of the Infrastructure Maintenance Services. The cost of such rectification shall be allocated in accordance with Clauses 52.16 and 52.17.

Additional System Availability

52.24 In circumstances where **tie** requires any Additional Available Infrastructure or Additional Available Trams for its own use, including but not limited to the training of drivers and

extended hours of operation for special events, it shall give the Infraco at least one week's notice of its requirements.

The Infraco shall confirm whether it is able to make available to **tie** any Additional Available Infrastructure or Available Trams requested by **tie**. If the Infraco confirms (such confirmation not to be unreasonably withheld) that it is able to make available to **tie** any such Additional Available Infrastructure or Available Trams, the Infraco shall be entitled to payment on the basis set out in Appendix B of Schedule Part 7 (*Maintenance Contract Price Analysis*). Such Additional Available Infrastructure or Available Trams shall be disregarded in relation to any calculations under Schedule Part 6 (*Maintenance Payment Regime*) and **tie's** remedy in the event of any deficiency in or failure to provide Additional Available Infrastructure or Available Trams shall be to apply deductions to payments on the basis set out in Appendix B of Schedule Part 7 (*Maintenance Contract Price Analysis*).

Operations and Maintenance Manual

52.25 The Infraco shall maintain and keep up to date the operations and maintenance manual and as built drawings and Spare Parts list (the "**Operations and Maintenance Manual**"). The Infraco shall provide to **tie's** Representative an electronic copy of such manual and each successive update, free of charge, as soon as reasonably practicable after their production. The Infraco shall provide to **tie's** Representative draft integrated manuals of description and maintenance of all Edinburgh Tram Network components not less than 90 days before the part of the Edinburgh Tram Network into which they are incorporated commences public service. The Infraco shall keep such manuals up to date and provide to **tie's** Representative a copy of each successive update as soon as reasonably practicable after their production.

Control Room

52.26 The Infraco shall provide and maintain the facility for the communication of information, CCTV images and data from the Control Room to CEC's traffic and information centre, to facilitate:

52.26.1 information exchange;

52.26.2 the provision of public transport data;

52.26.3 the provision of real time passenger information;

52.26.4 road traffic monitoring;

52.26.5 incident detection and emergency diversions management;

52.26.6 co-ordination of traffic signals; and

52.26.7 co-ordination of variable messages to passenger information displays.

53. HAZARDOUS MATERIALS

- 53.1 The Infraco undertakes that it is and will remain during the term of this Agreement, or that any relevant Infraco Party is and will remain during the Term, appropriately qualified and experienced in and accredited for the purposes of carrying out work of the scope, type and complexity that is required in carrying out the Maintenance Services involving the handling of any Hazardous Materials incorporated in the Edinburgh Tram Network or any Part thereof and shall maintain an up to date register recording the location, volume, type, storage condition, and handling and disposal procedures for such Hazardous Materials.
- 53.2 The Infraco shall not use any Hazardous Materials in performing the Maintenance Services except where expressly permitted to do so by the Maintenance Specification, Law and Good Industry Practice, or otherwise with the express prior written consent of **tie**. If Hazardous Materials are used other than expressly in accordance with the Maintenance Specification, Law and Good Industry Practice, or with the prior written consent of **tie**, the Infraco shall ensure that all such Hazardous Materials used in the provision of the Maintenance Services are expressly identified in writing to **tie** and the Operator by reference to this Clause 53 (*Hazardous Materials*) with reference to the hazards attached to them and the procedures that the Infraco has for managing such hazards.
- 53.3 The Infraco shall ensure that all Maintenance Services performed under this Agreement which involve Hazardous Materials, including the removal, handling and disposal of those materials, are carried out in such a manner as to ensure compliance with all Law (including any advisory literature provided by the Health and Safety Commission or Executive). The Infraco shall inform **tie's** Representative of any Hazardous Materials, which do not form part of the Maintenance Services or which are encountered in the course of the Maintenance Services and shall submit its proposed method of operation and the precautions to be taken before commencing any work involving such Hazardous Materials. Such submission shall be a **tie** Change and the terms of Clause 80 (*tie Changes*) shall apply. If the Infraco proposes to handle or dispose of such Hazardous Materials, it shall comply with Law (including any advisory literature provided by the Health and Safety Commission or Executive) and any additional precautions specified by **tie's** Representative as to their handling and disposal.

53.4 The Infraco acknowledges that it is aware that various health hazards may be encountered in performing the Maintenance Services (which may not be immediately apparent as deliberate and malicious concealment of such hazards may take place). The Infraco shall take all reasonably practicable precautions for the protection of the Infraco Parties, the **tie** Parties and any other person who may be affected by the Maintenance Services.

53.5 To the extent **tie** or any **tie** Party stores or uses Hazardous Materials at such area of the Depot as is under the responsibility of the Infraco pursuant to the Depot Licence, **tie's** Representative shall give reasonable notice to the Infraco so that the appropriate entry may be made on the register maintained by the Infraco subject always to the Infraco Representative's ability to advise promptly that:

53.5.1 such storage or use is not appropriate on the grounds that it poses an unreasonable additional responsibility on Infraco, due to the intended use, nature or quantity of the Hazardous Materials in question; or

53.5.2 such storage or use does not relate to transport-related services of which the Infraco has experience

in which event **tie** shall remove such Hazardous Materials and/or indemnify the Infraco from all costs arising from the presence of such Hazardous Materials at the Depot.

54. RECORDS AND COMPUTER SYSTEMS

54.1 All the Technical Records for any part installed, replaced, overhauled or inspected by the Infraco or an Infraco Party must be:

54.1.1 written up, maintained and kept up to date at all times by the Infraco in electronic or hard copy form in accordance with the requirements of the Maintenance Specification and/or the Employer's Requirements;

54.1.2 retained by the Infraco for the longer of:

54.1.2.1 the Term; or

54.1.2.2 6 years from the date on which the Maintenance Services to which such Technical Records relate are provided; and

54.1.3 copied to **tie** within 10 Business Days of a request by **tie** for such Technical Records.

- 54.2 **tie** will be entitled from time to time to inspect and audit such Technical Records following reasonable notice to the Infraco. When carrying out any inspection or audit under this Clause 54.2, **tie** shall use reasonable endeavours to minimise any disruption caused to the provision of the Maintenance Services by the Infraco or any Infraco Party.
- 54.3 Further, for each part of the Edinburgh Tram Network the following details shall be retained by the Infraco for not less than 6 years after completion of the Maintenance Services and such details provided to **tie** in accordance with the provisions of this Clause 54.3:
- 54.3.1 the change control register maintained pursuant to Clause 79.2; and
- 54.3.2 all other quality control activity records as agreed with **tie** from time to time.
- 54.4 The Technical Records will be written up and maintained by the Infraco in respect of all Maintenance Services in accordance with this Agreement and Good Industry Practice. Such Technical Records will, subject to Clause 54.5 be stored in IFS system or as otherwise agreed between the Parties.
- 54.5 Upon any request by **tie** for any Technical Record, or upon handover of the Technical Records pursuant to Clause 95.1, the Infraco shall provide such Technical Records in any suitable non-proprietary format as may be reasonably specified by **tie**.
- 54.6 The Infraco shall:
- 54.6.1 use all reasonable endeavours to ensure that the computer systems, equipment and other systems of the Infraco used by the Infraco in carrying out the Maintenance Services including the Asset Management System, any computer systems, equipment, other systems and parts supplied by the Infraco, are at all times free from disabling or destructive programs or devices including, without limitation, bugs, virus or logic bombs, Trojan horses and analogous macros, programs or sub-routines; and
- 54.6.2 ensure that appropriate security systems are implemented and maintained to protect the integrity and security of the Asset Management System and such computer systems, equipment and other systems from security and IT risks including, without limitation, unauthorised access (both by persons external to the Infraco and the Infraco's employees, agents and subcontractors).
- 54.7 In the event of a breach of Clause 54.6 , the Infraco shall conduct a full and complete review of its computer systems, equipment and other systems (including the security arrangements relating to such systems) to identify the source of such disabling or destructive program or

device and, at its own costs and with the prior written approval of the Infraco (such approval not to be unreasonably withheld or delayed) take such action as may be necessary to immediately remedy the breach and additionally to ensure that such breach does not re-occur.

55. SURVEYS OF THE EDINBURGH TRAM NETWORK AND AUDITS OF MAINTENANCE PROCEDURES

55.1 **tie** may carry out or procure surveys of the Edinburgh Tram Network in accordance with Clause 96 (*Surveys Prior to Expiry Date*) and **tie** may audit the Maintenance Procedures pursuant to Clause 104 (*Information and Audit Access*).

55.2 Where following any audit of Maintenance Procedures **tie** identifies non-conformances in the implementation of the Maintenance Procedures the Infraco shall take such steps as are agreed between the Parties to remedy such shortcomings.

55.3 When carrying out any audit under Clause 55.1, **tie** shall (or shall procure that any auditor shall) use reasonable endeavours to minimise any disruption to the provision of the Maintenance Services by the Infraco. Each Party shall bear their own cost of such audits, except where Clause 55.2 applies, when Infraco shall bear **tie's** reasonable and demonstrable costs.

56. SERVICE PERFORMANCE AND QUALITY MONITORING

56.1 The Infraco shall comply with the provisions of Schedule Part 6 (*Maintenance Payment Regime*).

56.2 In addition to the provisions set out in Schedule Part 6 (*Maintenance Payment Regime*), the Infraco shall send such representatives as **tie** may reasonably require to a performance meeting every Reporting Period (which will be convened on not less than 2 Business Days' notice by **tie**) and such other meetings as **tie** may reasonably require from time to time to discuss the performance of the Maintenance Services in accordance with the Agreement.

56.3 The Infraco shall submit a Service Quality Report to **tie** no later than 3 Business Days following each Reporting Period End Date. For the avoidance of doubt, **tie** shall not be obliged to process an invoice submitted by the Infraco in the absence of the Service Quality Report pertaining to the relevant Reporting Period. The Infraco shall be responsible for ensuring that the data contained in the Service Quality Report is generated automatically and, to the extent practicable, electronically.

- 56.4 In addition to the Service Quality Reports to be submitted by the Infraco pursuant to Clause 56.3 above, the Infraco shall prepare and submit to **tie** an Annual Service Report pursuant to Clause 73 (*Best Value*).
- 56.5 The Infraco shall monitor its compliance with this Agreement in respect of the Maintenance Services, and the Parties shall comply with the following provisions:
- 56.5.1 no later than 3 months before the Planned Service Commencement Date and on each anniversary thereafter, the Infraco shall provide to **tie's** Representative its proposed Self-Monitoring Plan for the following 12 months;
- 56.5.2 the Self-Monitoring Plan shall be designed to underpin **tie's** best value obligations and the Infraco shall have full regard to the requirements of Clause 73 (*Best Value*) when preparing its Self-Monitoring Plan;
- 56.5.3 no later than the date falling 20 Business Days after receipt by **tie's** Representative of such proposed Self-Monitoring Plan, **tie** shall notify the Infraco in writing as to whether or not it considers the Self-Monitoring Plan to be acceptable for the purposes of this Agreement; and
- 56.5.4 where **tie** considers the relevant Self-Monitoring Plan to be acceptable, then the Self-Monitoring Plan shall be implemented by the Infraco for the relevant 12 months; or
- 56.5.5 where **tie** does not consider the relevant Self-Monitoring Plan to be acceptable, then the Parties shall use all reasonable endeavours to reach agreement as to the contents of the Self-Monitoring Plan; and
- 56.5.6 until such time as the Self-Monitoring Plan has been accepted by **tie**, the previous year's Self-Monitoring Plan shall remain in effect;
- or, in default of such agreement, either Party may refer the matter for determination under the Dispute Resolution Procedure, and the Infraco shall implement the Self-Monitoring Plan as so agreed or determined.
- 56.6 The Infraco shall as soon as reasonably practicable provide **tie's** Representative with relevant particulars of failure to deliver the Maintenance Services. The Infraco shall co-operate with **tie** and provide such access as **tie** may reasonably require to enable **tie** at all reasonable times to observe, inspect and satisfy themselves (including by carrying out sample checks) as to the adequacy of the monitoring procedures implemented by the Infraco and the Infraco's compliance with this Agreement.

- 56.7 Subject to Clause 56.9, without prejudice to **tie's** other rights under this Agreement, if
- 56.7.1 at any time the Infraco has committed any material breach of its obligations under this Agreement; or
 - 56.7.2 following the issue of the Reliability Certificate, in any Reporting Period where Infraco's performance is below the standard required to achieve the Minimum Performance Payment,
- then **tie** may issue an Underperformance Warning Notice to the Infraco setting out the matter or matters giving rise to such notice and containing a reminder to the Infraco of the implications of such notice.
- 56.8 Following the service of an Under Performance Warning Notice in pursuant to Clause 56.7.2:
- 56.8.1 the Infraco shall within 10 Business Days of receipt of such Under Performance Warning Notice deliver to **tie** a plan setting out how the Infraco propose to remedy the issues which lead to the deductions leading to the service of such Under Performance Warning Notice and proposing a suitable timescale to remedy such issues (a "**Rectification Plan**");
 - 56.8.2 the Parties will use reasonable endeavours to agree the contents of the Rectification Plan within 10 Business Days of receipt by **tie**; and
 - 56.8.3 if the parties do not agree the Rectification Plan within 10 Business Days of receipt by **tie** either Party may refer the matter to the Dispute Resolution Procedure (provided that the Infraco may not refer or cause **tie** to refer the matter to the Dispute Resolution Procedure vexatiously to delay the agreement of a Rectification Plan).
- 56.9 **tie** shall not be entitled to serve:
- 56.9.1 more than one Under Performance Warning Notice in any Reporting Period;
 - 56.9.2 an Under Performance Warning Notice pursuant to Clause 56.7.2 in any two consecutive Reporting Periods; or
 - 56.9.3 a further Under Performance Warning Notice pursuant to 56.7.2 in respect of the same circumstances which led to the service of any previous Under Performance Warning Notice where the Infraco is using reasonable endeavours to comply with the terms of the Rectification Plan put in place to address the issues or circumstances which led to the service of a previous Under Performance Warning Notice

56.10 Without prejudice to **tie's** other rights under this Agreement, if the Infraco receives four or more Underperformance Warning Notices in any twelve (12) month period, **tie** may by notice to the Infraco increase the level of either **tie's** monitoring of the Infraco (including the employment by **tie** of additional performance monitoring officers), or (at **tie's** option) of the Infraco's monitoring of the Infraco's performance of its obligations under this Agreement, until such time as the Infraco shall have demonstrated to the reasonable satisfaction of **tie** that it will perform (and is capable of performing) its obligations under this Agreement, in which case the following provisions shall apply:

56.10.1 any such notice to the Infraco shall specify in reasonable detail the additional measures to be taken by **tie** or by the Infraco (as the case may be) in monitoring the performance of the Infraco;

56.10.2 if the Infraco (acting reasonably) objects to any of the specified measures on the grounds that they are excessive, it shall notify **tie** in writing, within 2 Business Days of the receipt of the notice, of the measures objected to (and of any changes necessary in order to prevent prejudice to the Infraco's performance of its obligations under this Agreement);

56.10.3 the measures to be taken by **tie** and the Infraco (as the case may be) shall be agreed between the Parties or, in the absence of agreement within 3 Business Days of **tie's** receipt of the Infraco's objection, be determined, at the referral of either Party, pursuant to the Dispute Resolution Procedure and on a basis which the relevant adjudicator considers reasonable having regard to the nature and seriousness of the breaches of this Agreement or circumstances leading to the issue of such Underperformance Warning Notices which have occurred, the likelihood of such breaches or circumstances recurring, the risks which would arise if such breaches or circumstances recurred, the level of culpability of the Infraco in relation to such breaches and circumstances and the actions being taken by the Infraco to prevent breaches of this Agreement or circumstances entitling **tie** to issue further Underperformance Warning Notices recurring; and

56.10.4 the Infraco shall bear its own costs and reimburse to **tie** on demand at all times from and against all reasonable costs and expenses incurred by or on behalf of **tie** in relation to such increased level of monitoring (including an appropriate sum in respect of general staff costs and overheads).

56.11 In the event that the Infraco Party responsible for any Underperformance Warning Notices is terminated, such Underperformance Warning Notices shall be automatically cancelled.

57. PERFORMANCE REVIEW

57.1 Following the end of each Performance Review Period, **tie** shall review and assess the performance of the Infraco on the basis set out in this Clause 57.

57.2 **tie** shall review the following:

57.2.1 the Infraco's historic performance under Schedule Part 6 (*Maintenance Payment Regime*);

57.2.2 whether the Infraco has complied with all of its obligations under this Agreement (and whether **tie** reasonably considers any breach(es) to have been both minor and infrequent); and

57.2.3 the Infraco's Maintenance Plan for the next Performance Review Period to jointly assess whether it is sufficiently robust to satisfy the Infraco, acting reasonably, that the Infraco will comply with its contractual obligations as stipulated in Clause 57.2.1 and 57.2.2 for the next Performance Review Period;

57.3 If any of the criteria set out at Clause 57.2 are not satisfied then **tie** may specify particular requirements in respect of those areas where the criteria set out at Clause 57.2 have not been satisfied, to be met by the Infraco by a specified date prior to the next Performance Review Date. If **tie** specifies such interim date then the provisions of this Clause 57 (*Performance Review*) will apply at the interim date, *mutatis mutandis*, as if that date was the original Performance Review Date (and as if the criteria set out at Clause 57.2 were the requirements specified by **tie** pursuant to this Clause 57.3).

58. TUPE AND HANDOVER

58.1 In this Clause 58 (*TUPE and Handover*) and Schedule Part 36 (*TUPE Information*) the following definitions shall apply:

"**Infraco Employees**" means any employee of the Infraco or Infraco Parties engaged in the performance of the Maintenance Services under this Agreement during the Termination Period;

"**New Provider**" means **tie** and/or any third party who takes over (or who the Infraco is notified will be taking over) the provision of some or all of the obligations of the Infraco under this Agreement;

"**Relevant Employee**" means any employee of the Infraco or an Infraco Party employed wholly or mainly in or assigned to the provision of the Maintenance Services under this Agreement as at the date of the Service Provision Change;

"**Service Provision Change**" means any termination, variation, amendment or other alteration of this Agreement which results in all or part of the Maintenance Services under this Agreement being provided by **tie** or by a third party;

"**Termination Period**" means either (i) the 12 month period ending on the Expiry Date or (ii) the period of any notice determining this Agreement prior to the Expiry Date;

"**TUPE Employees**" means any person whose contract of employment may be transferred to a successor contractor, operator or maintainer by virtue of the operation of Law (including the TUPE Regulations) or in respect of whom liabilities arising from the contract of employment or employment relationship may be transferred;

"**TUPE Information**" means the information in relation to the TUPE Employees specified in Schedule Part 36 (*TUPE Information*);

"**the TUPE Regulations**" means the Transfer of Undertakings (Protection of Employment) Regulations 2006.

58.2 NOT USED

58.3 The Infraco shall not, without the prior consent of **tie** (which shall not be unreasonably withheld or delayed), vary or purport or promise to vary, the terms or conditions (as amended from time to time) of employment of any Infraco Employee (including any promise to make any additional payment or provide any additional benefit) where such variation or addition takes effect in the Termination Period unless it is in the ordinary course of business.

58.4 NOT USED

58.5 Subject to Clause 58.6, the Infraco shall at the request of **tie** in the Termination Period provide the TUPE Information within 15 Business Days of such request and thereafter until termination or expiry of this Agreement update such information in accordance with the reasonable requests of **tie** subject to the Infraco's common law duties to their employees or under the Data Protection Act 1998. **tie** shall treat the TUPE Information as Confidential Information to which Clause 101 (*Confidential Information*) shall apply provided that **tie** shall only be permitted to use the TUPE Information for the purposes of conducting a tendering exercise for the appointment of a replacement service provider following a Service Provision

Change and shall only be entitled to disclose the TUPE Information to any tenderer pursuant to such exercise and subject to such tenderers accepting a confidentiality obligation in relation to such information equivalent to the obligations set out in Clause 101 (*Confidential Information*), mutatis mutandis.

- 58.6 The Infraco shall use its reasonable endeavours to ensure that it will be in a position to provide TUPE Information pursuant to Clause 58.5 in respect of the TUPE Employees who are not also Infraco Employees but, subject to the Infraco having used such reasonable endeavours, the Infraco's obligation to provide TUPE Information pursuant to Clause 58.5 in respect of such TUPE Employees shall be limited to the TUPE Information covering such TUPE Employees actually in the possession of or actually obtainable by the Infraco.

Establishment of hand-over procedure

- 58.7 During the Termination Period, the Infraco and **tie** both acting diligently and in good faith with a view to ensuring that there shall be no material deterioration or break in the provision of Maintenance Services, shall, at the cost of **tie**, establish appropriate handover procedures.

tie's obligations in relation to TUPE

- 58.8 **tie** shall within 20 Business Days of a request from the Infraco, provide the Infraco with such information as is requested by the Infraco in order to enable the Infraco to comply with its obligations under Regulation 13(2)(d) of the TUPE Regulations.

Continued technical support

- 58.9 For a period of six months after termination or expiry of this Agreement, the Infraco shall provide **tie** with such access as **tie** may reasonably require employees of Infraco having the appropriate knowledge and experience of the history of the Maintenance Services and associated technical matters for the following purposes:

58.9.1 general technical advice on subjects for which the Infraco was responsible pursuant to this Agreement; and

58.9.2 interpretation of maintenance history data, drawing modifications, regulations and the like.

tie shall reimburse the Infraco in respect of all reasonable and proper costs and expenses incurred by the Infraco in complying with this Clause 58 (*TUPE and Handover*)

Technical Records

58.10 Upon termination or expiry of this Agreement, the Infraco shall procure that **tie** is provided with an electronic copy of the Technical Records.

Deemed TUPE Transfer

58.11 **tie** and the Infraco acknowledge that in the event of a Service Provision Change, the TUPE Regulations may apply to such Service Provision Change. In the event that the TUPE Regulations do not apply to any Service Provision Change, the New Provider shall, with effect from the date of the Service Provision Change, offer employment to each Relevant Employee on like terms to the terms on which they would have become employed by the New Provider had the TUPE Regulations applied or, to the extent that it is not reasonably practicable to do so in respect of any such term, on terms which are not in such respect materially to the detriment of the Relevant Employee.

58.12 The New Provider shall treat the period of continuous service of each Relevant Employee or TUPE Employee with the Infraco or an Infraco Party up to the date of the Service Provision Change as continuous with such TUPE Employee's or Relevant Employee's service with the New Provider.

TUPE Transfer Indemnity

58.13 **tie** shall, or shall procure that any New Provider shall, indemnify the Infraco and any Infraco Party against any losses, costs, claims, demands, actions, fines, penalties, awards, liabilities and expenses (including reasonable legal expenses) incurred by the Infraco or any Infraco Party in connection with or as a result of:

58.13.1 any claim or demand by any TUPE Employee (whether in contract, delict, under statute, pursuant to Law or otherwise) arising directly or indirectly from any act, fault or omission of the New Provider in respect of any TUPE Employee on or after the date of termination of this Agreement or the ending of the provision in whole or in part of the obligations of the Infraco under this Agreement by the Infraco or any Infraco Party;

58.13.2 any failure by the New Provider to comply with its obligations under Regulation 13 of the TUPE Regulations;

58.13.3 any claim (including any individual entitlement of a TUPE Employee under or consequent on such claim) by any trade union or other body or person representing the

TUPE Employees arising from or connected with any failure by the New Provider to comply with any legal obligation to such trade union, body or person;

58.13.4 any change or proposed change in the terms and conditions of employment or working conditions of the TUPE Employees on or after their transfer to the New Provider, or to the terms and conditions of employment or working conditions of any person who would have been a TUPE Employee but for their resignation or decision to treat their employment as terminated under Regulation 4(9) of the Regulations on or before the Service Provision Change as a result of any such changes; and

58.13.5 the change of identity of employer occurring by virtue of the TUPE Regulations and/or this Agreement being significant and detrimental to any of the TUPE Employees, or to any person who would have been a TUPE Employee but for their resignation or decision to treat their employment as terminated under Regulation 4(9) of the Regulations as a result of the change in employer.

59. STEP-IN FOR HEALTH AND SAFETY AND ENVIRONMENTAL REASONS

59.1 The provisions of Clauses 59.1 to 59.5 (inclusive) shall apply if the Infraco is in breach of its obligations to provide the Infrastructure Maintenance Services under this Agreement, and **tie**, acting reasonably, considers action is required in connection with Infrastructure Maintenance Services because as a result of such breach (i) a serious risk exists to health or safety of persons or to the environment; or (ii) the safety of the general public is compromised.

59.2 If the circumstances set out in Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) apply, **tie**, acting reasonably, may (without prejudice to its other rights under this Agreement) either:

59.2.1 if **tie** considers that there is sufficient time and that it is likely that the Infraco will be willing and able to provide assistance, require the Infraco by written notice to take such steps as **tie** consider necessary or expedient to mitigate or rectify such circumstances and the Infraco shall use its best endeavours to comply with **tie**'s requirements as soon as reasonably practicable; and/or

59.2.2 if **tie** considers there is not sufficient time, or that the Infraco is not likely to be willing and/or able to take the necessary steps, take such steps as are necessary to remove or reduce such risk (either themselves or by engaging others to take any such steps).

59.3 If the Infraco:

59.3.1 does not confirm within 5 Business Days of a notice served pursuant to Clause 59.2 (or such shorter period as is specified by **tie** in the notice where **tie** (acting reasonably) considers there to be an emergency), that it is willing to take such steps as are referred to in Clause 59.2; or

59.3.2 fails to take the steps notified to it by **tie** pursuant to Clause 59.2 within such time as **tie**, acting reasonably, shall think fit,

then (without prejudice to Clause 59.2.1) **tie**, acting reasonably, may itself take, or engage others to take, such steps as they consider appropriate.

59.4 Where **tie** considers it to be necessary or expedient to do so, the steps which **tie** may take pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) shall include the partial or total suspension of the right and obligation of the Infraco to perform the Maintenance Services but only for so long as the circumstances referred to in Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) subsist.

59.5 Any reasonable and demonstrable costs, losses, expenses or damages incurred by the Infraco in taking such steps as are required by **tie** pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) shall be borne by the Infraco.

59.6 The Infraco shall reimburse **tie** for any reasonable and demonstrable costs and expenses incurred by **tie** in acting pursuant to this Clause 59 (*Step-In for Health and Safety and Environmental Reasons*) where such action is necessary by reason of the Infraco's failure to act pursuant to Clause 59.3 or its breach of this Agreement and **tie** shall be entitled to deduct any such amounts from any amount payable to the Infraco under the provisions of this Agreement.

PART 11 - PROGRAMME

60. PROGRAMME

60.1 The Infraco shall progress the Infraco Works with due expedition and in a timely and efficient manner without delay, to achieve timeous delivery and completion of the Infraco Works (or any part thereof) and its other obligations under this Agreement in accordance with the Programme. Notwithstanding the generality of the foregoing, the Infraco shall complete the Infraco Works in each Section so as to enable the Certificate of Sectional Completion in respect of each Section or Certificate of Service Commencement (as appropriate) to be issued

in accordance with Clauses 44 (*Notification of Sectional Completion of Sections A, B, C*) and 45 (*Notification of Service Commencement*) by the Planned Service Commencement Date or the relevant Planned Sectional Completion Date.

- 60.2 The Infraco shall update the Programme in accordance with the requirements of Schedule Part 2 (*Employer's Requirements*).
- 60.3 The Infraco shall submit to **tie's** Representative for his acceptance any change to the Programme showing the revised order or manner in which the Infraco proposes to carry out the Infraco Works.
- 60.4 **tie's** Representative shall within 5 Business Days after receipt of any revised programme from the Infraco:
- 60.4.1 accept the revised programme in writing; or
 - 60.4.2 reject the revised programme in writing with reasons; or
 - 60.4.3 request the Infraco to supply further information to clarify or substantiate the revised programme or to satisfy **tie's** Representative as to its reasonableness having regard to the Infraco's obligations under the Agreement.

Provided that if none of the above actions is taken within the said period of 10 Business Days, the Infraco shall issue a reminder to **tie** and if **tie** does not take any of the above actions within 5 Business Days of **tie's** receipt of such reminder, then **tie's** Representative shall be deemed to have accepted the revised programme as submitted.

- 60.5 The Infraco shall within 5 Business Days after receiving from **tie's** Representative any request under Clause 60.4.2 or within such further period as **tie's** Representative may allow, provide the further information requested, failing which the revised programme shall be deemed to be rejected.
- 60.6 Upon receipt of such further information, **tie's** Representative shall within a further 5 Business Days accept or reject the revised programme in accordance with Clauses 60.4 or 60.4.1. In the event that the revised programme is accepted, the revised programme shall form and become the Programme.
- 60.7 Should it appear to **tie's** Representative at any time that the actual progress of the Infraco Works does not conform with the Programme, **tie's** Representative shall be entitled to require the Infraco to produce a revised programme showing such modifications to the Programme as

may be necessary to ensure completion of the Infraco Works in each section by the relevant Planned Service Commencement Date. In such event the Infraco shall submit its revised programme within 10 Business Days or within such further period as **tie's** Representative may allow. Thereafter the provisions of Clauses 60.3 and 60.5 shall apply.

60.8 Acceptance by **tie's** Representative of the Infraco's programme in accordance with Clauses 60.3, 60.5 and 60.7 shall not relieve the Infraco of any of its duties or responsibilities under the Agreement.

60.9 The Infraco shall take all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works.

61. RATE OF PROGRESS AND ACCELERATION

Rate of Progress

61.1 If for any reason which does not entitle the Infraco to an extension of time, the rate of progress of the Infraco Works is at any time, in the reasonable opinion of **tie's** Representative, too slow to ensure substantial completion of any section by the Planned Sectional Completion Date for that Section, or any previously agreed revised time for completion agreed under Clause 61.2, **tie's** Representative shall notify the Infraco in writing and the Infraco shall thereupon take such steps as are necessary and to which **tie's** Representative may consent to expedite the progress so as substantially to complete the Section by the Planned Sectional Completion Date, such consent not to be unreasonably delayed or withheld. The Infraco shall not be entitled to any additional payment for taking such steps.

Acceleration

61.2 Where **tie** desires either:

61.2.1 a date for completion earlier than any Planned Sectional Completion Date current at the date of issue of the preliminary instruction under Clause 61.3; or

61.2.2 to have a Section or Sections completed by the relevant Planned Sectional Completion Date where, following delays or stoppage to programme for whatever reason, the Infraco Works would not be so completed in the absence of any acceleration or resequencing arrangements; or

61.2.3 to obviate the necessity for, or to order the cancellation of, or a reduction in the length of, any extension of time being fixed under Clause 64 (*Relief Events*) so that either the

Planned Service Commencement Date current at the date of preliminary instruction under Clause 61.3 is not extended or is not extended by the length of the extension of time that would otherwise have been given under Clause 64 (*Relief Events*);

tie's Representative may issue a preliminary instruction under Clause 61.3.

- 61.3 If **tie's** Representative issues a preliminary instruction to the Infraco to accelerate the carrying out or alter the sequence and timing of any work to be executed under the provisions of the Agreement, **tie's** Representative shall in such instruction set out the exact nature of the requirements of **tie** in regard to the Planned Service Commencement Date as referred to in Clause 61.2 for which the preliminary instruction has been issued.
- 61.4 If the Infraco makes a reasonable objection to such an instruction, the preliminary instruction shall either be withdrawn or so varied as to meet such objection and may then be re-issued by **tie's** Representative.
- 61.5 As soon as reasonably practicable after receipt of the preliminary instruction (or after receipt of a preliminary instruction re-issued under Clause 61.3) the Infraco shall inform **tie's** Representative in writing in respect of the proposed instruction:
- 61.5.1 of the amount of any additional cost to which the Infraco should be entitled as a result of compliance with the instruction when issued by **tie's** Representative subject to Clause 61.3; or
- 61.5.2 that it is not reasonably practicable to state such a sum and that the cost to **tie** of compliance by the Infraco will therefore have to be ascertained in accordance with Clause 80 (*tie Changes*); and
- 61.5.3 of the earlier date for completion which can become the Planned Service Commencement Date for all the purposes of the Agreement; or
- 61.5.4 of the extent to which an extension of time that would otherwise be fixed under Clause 64 (*Relief Events*) can be cancelled or reduced and the date for completion which as a result will be or become the Planned Service Commencement Date for all the purposes of the Agreement.
- 61.6 If on receipt of the information given to **tie's** Representative under Clause 61.4 **tie** wishes to pay the amount referred to in Clause 61.5.1 and to accept the new Planned Service Commencement Date stated by the Infraco pursuant to Clause 61.5.3, **tie** shall cause **tie's** Representative to issue an instruction:

- 61.6.1 confirming the details of the acceleration or alteration of sequence or timing required, and
- 61.6.2 fixing the new Planned Service Commencement Date and the amount to which Clause 61.5.1 refers shall be included as if it were a variation.
- 61.7 Following any instruction under Clause 61.6 the Infraco shall revise the Programme in accordance with the terms of Clause 60 (*Programme*).

Incentivisation Bonus

61.8 Within seven (7) days of the date programmed for completion of each Section in Schedule Part 15 and against the submission of a valid VAT invoice, **tie** shall pay the Infraco an incentivisation bonus with respect to the completion of each Section of the Infraco Works as follows:

- 61.8.1 Section A £1,200,000 (one million two hundred thousand)
- 61.8.2 Section B £1,200,000 (one million two hundred thousand)
- 61.8.3 Section C £1,200,000 (one million two hundred thousand)
- 61.8.4 Section D £1,200,000 (one million two hundred thousand)

except where Infraco has failed to achieve sectional completion by the Planned Sectional Completion Date and such failure is not due to a Compensation Event, Notified Departure, **tie** Change or Relief Event in which event such amounts will be paid within seven (7) days of issue by **tie** of the relevant Certificate of Sectional Completion.

62. LIQUIDATED AND ASCERTAINED DAMAGES

62.1 Liquidated and ascertained damages shall be recoverable by **tie** in respect of delay to Planned Sectional Completion Dates as follows:

- 62.1.1 if the Infraco fails to achieve completion of any of Section A, Section B, Section C or Section D by the Planned Sectional Completion Date for that Section, the Infraco shall pay to **tie** the sum prescribed in Clause 62.2 for that Section for every week (or pro-rated for each calendar day) which shall elapse between the Planned Sectional Completion Date and the actual Sectional Completion Date for that Section. The liquidated and ascertained damages in respect of Section A, Section B and Section C

shall be cumulative during any period in which there is delay to Planned Sectional Completion to two or more Sections.

62.1.2 liquidated and ascertained damages in respect of Section D shall only be payable in respect of a delay to achieving completion of Section D by the Planned Sectional Completion Date for Section D caused by events occurring after the Sectional Completion Date for Section C and during the carrying out of Section D.

62.2 The liquidated and ascertained damages payable by the Infraco (where the delay is attributable to Infraco solely or both Infraco and the Tram Supplier) attached to non completion of each Section are as follows:

62.2.1 Section A £20,000 per week;

62.2.2 Section B £23,000 per week;

62.2.3 Section C £195,000 per week; and

62.2.4 Section D £246,000 per week,

provided that Infraco shall not be liable for any liquidated and ascertained damages where the failure to complete any of Section A, Section B, Section C or Section D is caused solely by the failure of the Tram Supplier to achieve any Certificate of Tram Commissioning by the Agreed Tram Commissioning Date for that Tram as specified in the Tram Supply Agreement.

62.2A Subject to Clause 62.9.2, in the event that:

62.2A.1 the first Tram to be issued with a Certificate of Tram Commissioning is not issued with such certificate by the Agreed Tram Commissioning Date liquidated and ascertained damages shall be payable by Infraco at the rate of 1% of the Tram Price (as defined in the Tram Supply Agreement) for each period of seven days (with an apportionment on a time basis for each part period) by which the issue of such Certificate of Tram Commissioning is delayed after the Agreed Commissioning Date and until such a Certificate of Tram Commissioning is issued in respect of such Tram; and

62.2A.2 any other Tram to be issued with a Certificate of Tram Commissioning is not issued with such certificate by the Agreed Commissioning Date the Tram Supplier shall, in respect of each such Tram, liquidated and ascertained damages shall be payable by Infraco at the rate of 0.5% of the Tram Price (as defined in the Tram Supply

Agreement) for each period of seven days (with an apportionment on a time basis for each part period) by which the issue of such Certificate of Tram Commissioning is delayed after the Agreed Commissioning Date and until such a Certificate of Tram Commissioning is issued in respect of such Tram.

62.3 Subject to Clause 62.9, the total aggregated amount of any liquidated and ascertained damages payable by the Infraco to **tie** under this Clause 62 (*Liquidated and Ascertained Damages*) shall be limited to ten percent (10%) of the Construction Works Price and such cap shall exclude any liquidated and ascertained damages which are payable to **tie** under Clauses 62.2A and 62.6.

62.4 **tie** may:

62.4.1 deduct and retain the amount of any liquidated and ascertained damages becoming due under the provisions of Clause 62.1 from any sums due or which become due and payable to the Infraco; or

62.4.2 require the Infraco to pay such amount to **tie** forthwith.

If upon a subsequent or final review of the circumstances causing delay, **tie's** Representative grants a relevant extension or further extension of time in respect of the Planned Sectional Completion Date (in relation to Section A, Section B, Section C and Section D) or the Planned Service Commencement Date, **tie** shall no longer be entitled to apply liquidated and ascertained damages in respect of the period of such extension. Any sum in respect of such period which may already have been recovered under this Clause 62 (*Liquidated and Ascertained Damages*) shall be reimbursed forthwith to the Infraco. Interest shall be payable by **tie** on any amounts so reimbursed at a rate per annum equivalent to 2% above the base rate of The Royal Bank of Scotland plc current on the date upon which the liquidated and ascertained damages were actually paid by (by deduction or otherwise) the Infraco to **tie**, adjusted to reflect any changes to the rate during which the period over which the liquidated and ascertained damages were retained by **tie**.

62.5 If after liquidated and ascertained damages have become payable under Clause 62.1, **tie's** Representative orders a variation under Clause 80 (**tie Changes**) or any other situation outside the Infraco's control arises any of which in **tie's** Representative's opinion results in additional and further delay to that part of the Infraco Works:

62.5.1 **tie's** Representative shall so notify the Infraco and **tie** in writing; and

62.5.2 **tie's** further entitlement to liquidated and ascertained damages in respect of that part of the Infraco Works shall be suspended until **tie's** Representative notifies the Infraco and **tie** in writing that the additional and further delay has come to an end.

Such suspension shall not invalidate any entitlement to liquidated and ascertained damages which accrued before the period of additional and further delay started to run and, subject to any subsequent or final review of the circumstances causing delay, any monies already deducted from or paid by the Infraco as liquidated and ascertained damages under the provisions of this Clause 62 (*Liquidated and Ascertained Damages*) may be retained by **tie**.

Liquidated Damages for Weight

62.6 If a Tram exceeds the Maximum Tram Weight then the Infraco shall pay liquidated damages in respect of each such Tram of an amount calculated in accordance with said part 2 of Schedule Part 5 provided that if the amount that a Tram is overweight is equal to or more than an amount equal to five per cent (5%) of the Maximum Tram Weight, **tie** shall without prejudice to its other rights or remedies be entitled to reject the Tram.

General

62.7 The parties hereby acknowledge and confirm that the liquidated and ascertained damages payable pursuant to this Clause 62 (*Liquidated and Ascertained Damages*) at the rate and in respect of the circumstances set out in this Clause 62 (*Liquidated and Ascertained Damages*) represent a genuine pre-estimate of the loss that is anticipated to be suffered by **tie** consequent to a failure by the Infraco to comply with those obligations under this Agreement to which they relate. Neither party shall contend otherwise in any submission, claim or proceeding arising out of or in connection with this Agreement.

62.8 All sums payable by the Infraco to **tie** pursuant to this Clause 62 (*Liquidated and Ascertained Damages*) shall be paid as liquidated and ascertained damages for delay and not as a penalty. For the avoidance of doubt, the Infraco shall bear its own costs arising from delay caused by the Tram Supplier.

62.9 The recovery by **tie** of liquidated and ascertained damages under this Clause 62 (*Liquidated and Ascertained Damages*) shall not in any way relieve the Infraco from its obligation to complete the Infraco Works, nor from any of its other obligations or liabilities under the Agreement provided that

62.9.1 the liquidated and ascertained damages payable pursuant to this Clause 62.9 shall, subject to any rights to terminate pursuant to Clause 90 (*Termination on Infraco*

Default), be **tie's** sole and exclusive remedy and shall be in full and final satisfaction in respect of any claim arising from delay in achieving the Planned Sectional Completion Date for any of Section A, Section B, Section C and Section D;

62.9.2 the Infraco's liability in respect of liquidated damages for delay arising solely as a result of delay in delivering or commissioning of the Trams due to the acts or omissions of the Tram Supplier shall be limited to an aggregate amount of eleven percent (11%) of the Tram Price as defined in the Tram Supply Agreement.

62.10 In the event that at any time the amount representing liquidated damages, save in respect of liquidated damages for delay arising solely as a result of delay in delivering or commissioning of the Trams due to the acts or omissions of the Tram Supplier, exceeds the aggregate liability of the Infraco to **tie** for liquidated damages as described at Clause 62.3, whether paid or unpaid, **tie** may deliver to the Infraco a notice in writing requesting an increase in the Maximum Liquidated Damages ("**Liquidated Damages Cap Increment**"), which notification shall include **tie's** calculation of a proposed Liquidated Damages Cap Increment and indicate that failure to respond within 10 Business Days will constitute an Infraco Default entitling **tie** to terminate the Infraco Contract pursuant to Clause 62.11. The Infraco may respond in writing before the expiry of ten (10) Business Days from the date of such notification confirming its agreement to such Liquidated Damages Cap Increment and upon such agreement the Maximum Liquidated Damages shall be increased by the amount of the Liquidated Damages Cap Increment.

62.11 In the event that Infraco does not respond to **tie's** notification under Clause 62.10 within 10 Business Days of the date of the relevant notification or rejects **tie's** request, such lack of response or rejection shall constitute an Infraco Default and **tie** shall be entitled to issue a termination notice pursuant to Clause 90 (*Termination on Infraco Default*).

PART 12 - PROTESTOR ACTION, EXTENSIONS OF TIME AND COMPENSATION EVENTS

63. PROTESTOR ACTION

63.1 The Infraco shall use all reasonable endeavours as are necessary to protect:

63.1.1 the Edinburgh Tram Network as installed from protestor action during the period from the Commencement Date until the date of issue of the Certificate of Service Commencement; and

63.1.2 the Depot from protestor action during the period from the day after the date of issue of the Sectional Completion Certificate for Section A and the last day of the Term.

63.2 The Infraco shall be responsible for repairing, reinstating or making good any damage to the Infraco Works which is caused by or results from protestor action in accordance with Clauses 31 (at any time prior to the date of issue of the Certificate of Service Commencement) and pursuant to Clauses 52.16 and 52.17 (at any time following the date of issue of the Certificate of Service Commencement).

63.2.1 If the Edinburgh Tram Network or any part thereof is occupied by protestors at any time during the term of this Agreement, then the Infraco shall notify **tie** as soon as reasonably practicable of this occurrence.

63.2.2 **tie** shall procure that protestors are removed and may request the reasonable assistance of Infraco to remove protestors.

63.2.3 Where **tie** is given assistance in accordance with Clause 63.2.2 then, in respect of any protestor action, **tie** will indemnify Infraco in respect of any demonstrable costs, losses, liabilities, expenses and claims suffered by Infraco as a result of or in connection with the provision of such assistance.

64. RELIEF EVENTS

64.1 If and to the extent that a Relief Event is the direct cause of (i) a delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or a Certificate of Service Commencement on or before the Planned Service Commencement Date, or (ii) adversely effects Infraco's ability to perform any of its obligations under this Agreement (including its ability to perform the Maintenance Services), then the Infraco shall be entitled to apply for an extension of time or relief from performance of obligations. The Infraco's sole right to such extension of time or relief from performance of its obligations in connection with a Relief Event shall be as set out in this Clause 64 (*Relief Events*).

64.2 To obtain such extension of time or relief from performance, the Infraco must, as soon as practicable, and in any event within 20 Business Days after it first became aware that the Relief Event had caused or is likely to cause delay:

64.2.1 give to **tie** a notice of its claim for an extension of time or relief from performance and full details of the nature of the Relief Event, the date of occurrence and its likely duration;

64.2.2 include in any notice given under Clause 64.2.1 full details of the extension of time or relief claimed including:

64.2.2.1 the Infraco's estimate of the likely effect of such delay upon the Programme (if any) or the adverse effects on the performance of its obligations under this Agreement;

64.2.2.2 mitigation measures adopted and why unsuccessful; and

64.2.2.3 any acceleration or other measures which the Infraco could take to mitigate the effects of such delay or non-performance and, where applicable, an estimate of the costs thereof;

provided that where a Relief Event has a continuing effect or the Infraco is unable to determine whether the effect of the Relief Event will actually cause it not to be able to comply with its obligations under this Agreement, such that it is not practicable for the Infraco to submit full details in accordance with this Clause 64.2 then the Infraco shall instead submit to **tie**:

(a) a statement to that effect with reasons, together with interim written particulars (including details of the likely consequences of the Relief Event on the Infraco's ability to comply with its obligations under this Agreement and an estimate of the likelihood and likely extent of the delay or non-performance); and

(b) thereafter, further interim written particulars until the actual delay caused or non-performance (if any) is ascertainable, whereupon the Infraco shall as soon as reasonably practicable, submit to **tie** the items referred to in Clause 64.2.2.

64.2.3 demonstrate to the reasonable satisfaction of **tie** that:

64.2.3.1 Infraco and the Infraco Parties could not reasonably have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;

64.2.3.2 the Relief Event is the direct cause of the delay or non-performance; and

64.2.3.3 the Infraco is using reasonable endeavours to perform its obligations under this Agreement.

- 64.3 In the event that the Infraco has complied with its obligations under Clause 64.2, then (as applicable in the circumstances):
- 64.3.1 the Planned Service Commencement Date and/or the Planned Sectional Completion Dates shall be postponed by such time; and/or
- 64.3.2 Infraco shall be given relief from its obligations under this Agreement,
- as shall be reasonable for such a Relief Event, taking into account the likely effect of delay and on Infraco's ability to perform its obligations under this Agreement and where appropriate the Programme shall be revised by the Infraco in accordance with Clauses 60.2 to 60.5 (inclusive).
- 64.4 In the event that information required by Clause 64.2 is provided after the dates referred to in that Clause, then the Infraco will not be entitled to any relief in respect of or during the period for which the information is delayed.
- 64.5 The Infraco shall notify **tie** if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.
- 64.6 If the Parties cannot agree the extent of the extension of time or relief required or **tie** disagrees that a Relief Event has occurred (or as to its consequences) or that the Infraco is entitled to any extension of time or relief from the performance of its obligations, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.
- 64.7 **tie** shall, in assessing any delay, extension of time or relief for the purpose of this Clause 64 (*Relief Events*):
- 64.7.1 not take into account any event or cause of delay which is caused by any negligence, default, breach of contract or breach of statutory duty of the Infraco or any Infraco Parties; and
- 64.7.2 take into account an event or cause of delay only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works.

- 64.8 The Infraco shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time in respect of any failure by the Infraco to:
- 64.8.1 identify any long lead time works and/or order any long lead time materials; or
 - 64.8.2 identify any enabling works which are required in order to commence any part of the Infraco Works; or
 - 64.8.3 subject to Clause 19 manage any required interface with CEC in so far as this forms part of the Infraco Works; or
 - 64.8.4 subject to Clause 19 manage the required interface with any Approval Body and/or third party where consent or approval for the Infraco Works is required at any stage of such works; or
 - 64.8.5 identify any instructions which are required from **tie** in order to progress the Infraco Works in accordance with the Programme, provided that following the occurrence of a Relief Event nothing in this Clause 64.8 shall prevent any long lead times, enabling works, required interfaces with CEC, any Approval Body and/or third party, or instructions which are required from **tie** from being taken into account when considering extensions of time in accordance with Clause 64.
- 64.9 If the Infraco Works are delayed in circumstances other than those entitling the Infraco to an extension of time as set out in this Clause 64 (*Relief Events*), the Infraco shall inform **tie** at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. In such circumstances, the Infraco at its own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme.
- 64.10 Notwithstanding the occurrence of a Relief Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 64 (*Relief Events*).

65. COMPENSATION EVENTS

- 65.1 If and to the extent that a Compensation Event:
- 65.1.1 is the direct cause of a delay in achievement of the issue of a Certificate of Sectional Completion on or before the Planned Sectional Completion Date for a Section or the Certificate of Service Commencement on or before the Planned Service Commencement Date (as appropriate); and/or

65.1.2 directly and adversely affects Infraco's ability to perform any of its obligations under this Agreement (including its ability to perform the Maintenance Services); and/or

65.1.3 causes the Infraco to incur costs beyond such costs which were reasonably anticipated to be incurred by the Infraco but for the occurrence of the Compensation Event;

then the Infraco shall be entitled to apply for an extension of time and/or relief from the performance of its obligations, and/or claim for additional costs under this Agreement. The Infraco's sole right to an extension of time and/or relief from the performance of its obligations and/or to claim costs in connection with a Compensation Event shall be as set out in this Clause 65 (*Compensation Events*).

65.2 To obtain such extension of time and/or relief from performance and/or claim for such costs, the Infraco must, as soon as practicable, and in any event within 20 Business Days after it first became aware that the Compensation Event had caused or is likely to cause delay, adversely affect the performance of Infraco's obligations, or cause the Infraco to incur additional costs:

65.2.1 give to **tie** a notice of its claim for an extension of time and/or costs and relief from performance of its obligations and full details of the nature of the Compensation Event, the date of occurrence and its likely duration (a "**Compensation Event Notice**");

65.2.2 include in any notice given under Clause 65.2.1 full details of the extension of time and relief required and/or any costs claimed including:

65.2.2.1 the Infraco's estimate of the likely effect of such delay upon the Programme (if any) or the adverse effects on the performance of its obligations under this Agreement;

65.2.2.2 details of the costs or losses which are not Indirect Losses;

65.2.2.3 mitigation measures adopted and why unsuccessful; and

65.2.2.4 any acceleration or other measures which the Infraco could take to mitigate the effects of such delay or non-performance and, where applicable, an estimate of the costs thereof;

provided that where a Compensation Event has a continuing effect or the Infraco is unable to determine whether the effect of the Compensation Event will actually cause it not to be able to comply with its obligations under this Agreement, such that it is not

practicable for the Infraco to submit full details in accordance with this Clause 65.2 then the Infraco shall submit to **tie**:

- (a) a statement to that effect with reasons, together with interim written particulars of the items referred to at Clause 65.2.2 insofar as such items are available (including details of the likely consequences of the Compensation Event on the Infraco's ability to comply with its obligations under this Agreement and an estimate of the likelihood and likely extent of the delay or non-performance and the costs incurred); and
- (b) thereafter, further interim written particulars as set out in Clause 65.2.2(a) until the actual delay caused and costs incurred or non-performance (if any) are ascertainable, whereupon the Infraco shall as soon as reasonably practicable, submit to **tie** the items referred to in Clause 65.2.2; and

65.2.3 demonstrate to the reasonable satisfaction of **tie** that:

65.2.3.1 subject to Clause 65.12, Infraco and the Infraco Parties could not reasonably have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken;

65.2.3.2 the Compensation Event is the direct cause of the delay, inability to perform and/or the additional costs; and

65.2.3.3 the Infraco is using reasonable endeavours to perform its obligations under this Agreement.

65.2A1 **tie** shall complete a review of the notification and submissions made by the Infraco pursuant to Clauses 65.2.1 and 65.2.2 and shall notify the Infraco within 20 Business Days of receipt (or such other period as the Parties acting reasonably may agree in the light of the complexity of the Compensation Event Notice and further information expected pursuant to Clause 62.2.2(b)):

65.2A1.1 its agreement or otherwise on whether a Compensation Event has occurred;

65.2A1.2 its agreement or otherwise regarding the extension of time, additional costs and other relief sought by the Infraco and where **tie** does not agree such matters, **tie's** assessment in relation to the Infraco's entitlement to extension of time, additional costs and relief;

- 65.2A1.3 what further information **tie** requires to enable evaluation (or its completion) of any element of the Infraco's Compensation Event Notice.
- 65.2A2 In the event that **tie** (acting reasonably) requires further information from Infraco pursuant to Clause 65.2A1.3 then Clauses 65.2A1.2 shall apply and **tie** shall complete its review of the further information and respond within 20 days of its receipt.
- 65.3 In the event that the Infraco has complied with its obligations under Clause 65.2.2, then (as applicable in the circumstances):
- 65.3.1 the Planned Service Commencement Date and/or the relevant Planned Sectional Completion Dates shall be postponed by such time; and/or
- 65.3.2 Infraco shall be given such relief from performance of its obligations under this Agreement
- as shall be reasonable for such a Compensation Event , taking into account the likely effect of delay and on Infraco's ability to perform its obligations under this Agreement and where appropriate the Programme shall be revised by the Infraco in accordance with Clauses 60.2 to 60.5; and/or
- 65.3.3 the Infraco shall be paid the amount of any direct and demonstrable additional cost as may be reasonable in the circumstances of the Compensation Event (as agreed by the Parties or determined pursuant to the Dispute Resolution Procedure) , such payment to be made through the operation of Clause 67 (*Application for Milestone Payment*) and in relation to that proportion of the amount to which the Infraco is entitled which relates to additional costs expended in earlier Reporting Periods, payment shall be included in the next Application for Milestone Payment following **tie's** assessment in relation to the Infraco's entitlement to extension of time, additional costs and relief pursuant to Clause 65.2A1.2;
- 65.4 In the event that information required by Clause 64.2 is provided after the dates referred to in that Clause, then the Infraco will not be entitled to any relief in respect of or during the period for which the information is delayed.
- 65.5 The Infraco shall notify **tie** if at any time it receives or becomes aware of any further information relating to the Compensation Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

- 65.6 If, following **tie's** review and notification pursuant to Clauses 65.2A1 and 65.2A2, the Infraco disagrees with the notification that no Compensation Event has occurred, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.
- 65.7 If, following **tie's** review and notification pursuant to Clauses 65.2A1 and 65.2A2, the Parties have not agreed the extent of the extension of time, relief or the additional costs assessed and notified by **tie** within 10 Business Days of notification by **tie** of its assessment that a Compensation Event has occurred, either Party may refer the matter for determination in accordance with the Dispute Resolution Procedure.
- 65.8 **tie** shall, in assessing any delay or extension of time or costs or relief for the purpose of this Clause 65 (*Compensation Events*)
- 65.8.1 not take into account any event or cause of delay or costs which is caused by any negligence, default of breach of contract or breach of statutory duty of the Infraco or any of the Infraco Parties; and;
- 65.8.2 take into account an event or cause of delay or costs only if and to the extent that the Infraco establishes to the satisfaction of **tie** that the Infraco has used its reasonable endeavours to adjust the order and sequence in which the Infraco proposes to execute the Infraco Works in such a manner as to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress of the Infraco Works and mitigate the costs.
- 65.9 The Infraco shall not be entitled to and shall be deemed to have irrevocably waived any entitlement to any extension of time and/or additional costs in respect of any failure by the Infraco to:
- 65.10.1 identify any long lead time works and/or order any long lead time materials; or
- 65.10.2 identify any enabling works which are required in order to commence any part of the Infraco Works; or
- 65.10.3 subject to Clause 19 manage the required interface with CEC in so far as this forms part of the Infraco Works; or
- 65.10.4 subject to Clause 19 manage any required interface with any Approval Body and/or third party where consent or approval for the Infraco Works is required at any stage of such works; or

65.10.5 identify any instructions which are required from **tie** in order to progress the Infraco Works in accordance with the Programme,

provided that following the occurrence of a Compensation Event nothing in this Clause 65.10 shall prevent any long lead times, enabling works, required interfaces with CEC, any Approval Body and/or third party, or instructions which are required from **tie** from being taken into account when considering extensions of time and/or additional costs in accordance with Clause 65 (*Compensation Events*).

65.10 If the Infraco Works are delayed in circumstances other than those entitling the Infraco to an extension of time or relief as set out in this Clause 65 (*Compensation Events*), the Infraco shall inform **tie** at the earliest opportunity and shall give an estimate of the likely effect upon the Programme. In such circumstances, the Infraco at its own expense shall take such acceleration measures as are necessary to achieve the requirements of the Programme.

65.11 Notwithstanding the occurrence of a Compensation Event, the Infraco shall continue to carry out the Infraco Works unless otherwise agreed in connection with this Clause 65 (*Compensation Events*).

65.12 Where a claim is made under this Clause 65 as a result of the occurrence of a SDS Compensation Event:

65.12.1 Clause 65.2.3.1 shall not apply to steps which might reasonably be expected to have been taken by the SDS Provider;

65.12.2 if the SDS Compensation Event is Compensation Event (t) there shall be deducted from any additional costs which Infraco is entitled to recover pursuant to Clause 65.2 the amount of liquidated damages recoverable from the SDS Provider pursuant to Clause 27.7 of the SDS Agreement (as amended by the SDS Novation Agreement)

65.13 If the SDS Compensation Event is Compensation Event (u), there shall be deducted from any additional costs which Infraco is entitled to recover pursuant to Clause 65.2, the full amount recoverable by Infraco (that is to say up to ten million pounds (£10,000,000) for each and every event) pursuant to the SDS Agreement and specifically Clause 27 (as amended by the SDS Novation Agreement) as a result of the occurrence of such Compensation Event.

PART 13 - PAYMENT AND TAXATION

66. PAYMENT OF THE CONTRACT PRICE

- 66.1 Subject to the terms of this Agreement, **tie** shall pay the Contract Price to the Infraco for the carrying out and completion of the Infraco Works.
- 66.2 Any application for payments of sums due in respect of Construction Milestones, Critical Milestones and Tram Milestones and any payment to be made in respect of Construction Milestones, Critical Milestones and Tram Milestones shall be made in accordance with the procedure set out in Clause 67 (*Payment in Respect of Applications for Milestone Payments*).
- 66.3 Any application for payments of sums due in respect of the Maintenance Services and any payment to be made in respect of Maintenance Services shall be made in accordance with the procedure set out in Clause 68 (*Payment in Respect of Maintenance Services*).
- 66.4 Until the issue of the Certificate of Service Commencement, any application for payments of sums due in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement shall be made in accordance with the procedure set out in Clause 67 (*Payment in Respect of Applications for Milestone Payments*).
- 66.5 Subject to Clause 66.6, after the issue of the Certificate of Service Commencement, any application for payments of sums due in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement shall be made in accordance with the procedure set out in Clause 68 (*Payment in Respect of Maintenance Services*).
- 66.6 Promptly following the issue of the Certificate of Service Commencement, **tie** shall prepare and issue a statement of final account which the Parties, acting reasonably, shall use reasonable endeavours to agree within forty five days of its issue. If and to the extent that the Parties, fail to agree the statement of final account within 45 days, either Party will be entitled to refer the matter to the Dispute Resolution Procedure for determination. In the absence of manifest error, and subject to Infraco's right to apply for further payment in accordance with this Clause, the agreed statement of final account shall be conclusive and binding on the Parties as regards all amounts due and paid pursuant to this Agreement in connection with the design, construction, installation, testing, commissioning and maintenance of the Infraco Works up to the date of issue of the Certificate of Service Commencement. The Infraco shall not be entitled to apply for any further payment regarding Infraco Works completed prior to

the date of the Certificate of Service Commencement after the date which falls three months after agreement of the statement of final account, except to the extent such further payment relates directly to latent defects caused by a deficiency in design produced by the SDS Provider (subject to Infraco's rights and obligations in respect of such latent defects under this Agreement) or relates to payments which are the subject of formal dispute resolution process pursuant to Clause 97 (*Dispute Resolution Procedure*) commenced no later than six months from the date of issue of the statement of final account by **tie**.

67. PAYMENT IN RESPECT OF APPLICATIONS FOR MILESTONE PAYMENTS

Application for Milestone Payments

67.1 The Infraco shall submit each Application for Milestone Payment, and/or an application for payment for any other fees, costs and/or expenses in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement which are being claimed by the Infraco for the previous Reporting Period, to **tie's** Representative within 3 Business Days following each Reporting Period End Date provided that:

67.1.1 save in the case where the **tie** Representative has not issued a Construction Milestone Completion Certificate or a Critical Milestone Completion Certificate pursuant to Clause 41 without notifying a reason for not doing so within 10 Business Days of the date on which it is established that the relevant Construction Milestone or Critical Milestone has been achieved pursuant to Clause 41.3, the Infraco shall not submit an Application for Milestone Payment claiming payment in respect of a Construction Milestone or Critical Milestone for which **tie's** Representative has not issued a Construction Milestone Completion Certificate or a Critical Milestone Completion Certificate;

67.1.2 subject to Clause 67.1.1, the Infraco may submit an Application for Milestone Payment even if **tie's** Representative has not issued a Milestone Completion Certificate in respect of every Milestone which has been identified in that Application for Milestone Payment; and

67.1.3 NOT USED

67.1.4 subject to Clause 67.1.1, the Infraco may include an application for payment in respect of Milestones or Critical Milestones identified in a previous Application for Milestone Payment.

- 67.2 Each Application for Milestone Payment shall include any amounts properly due to be paid to the SDS Provider pursuant to the SDS Agreement. For the avoidance of doubt, such Applications for Milestone Payments may also include any payments properly due under the SDS Agreement in respect of the deliverables developed by the SDS Provider pursuant to clauses 4.6 and 4.7 of the SDS Novation Agreement.
- 67.3 NOT USED
- 67.4 Each Application for Milestone Payment and/or an application for payment for any other fees, costs and/or expenses in respect of Permitted Variations or other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement shall:
- 67.4.1 set out the Milestones and Critical Milestones progressed in that Reporting Period and the Milestone Payment due in respect of the same;
- 67.4.2 set out any other agreed adjustments pursuant to a Permitted Variation; and
- 67.4.3 any other sums due to or from the Infraco under and/or arising out of this Agreement in accordance with its terms,
- (together with reasonable supporting documentation establishing the basis of such sums being claimed).
- 67.5 **tie** shall procure that **tie's** Representative shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing (a "**Construction Interim Certificate**") to the Infraco that part of the sum claimed in the application for payment which is approved by **tie** and give reasons why any part of the sum claimed has not been certified and the value of the sums involved no later than 5 Business Days after the date on which application for payment was received by **tie**. If the Infraco fails to achieve the prescribed Environmental or Health and Safety Key Performance Indicators as set out in Schedule Part 40 (*Environmental and Health and Safety Key Performance Indicators*) in any Reporting Period, **tie** shall make a deduction of 1% (the "**EHS KPI Deduction**") from the value of the Construction Interim Certificate save where and to the extent that the Infraco demonstrates to **tie's** satisfaction that such failure to achieve the prescribed Environmental or Health and Safety Key Performance Indicators did not result from a deficiency in either the Construction Phase Health and Safety Plan or from a failure in its management, in accordance with Good Industry Practice, of health, safety, quality or environmental aspects of the Infraco Works. **tie** shall release the EHS KPI Deduction as soon

as the Infraco has satisfied **tie** that the Construction Phase Health and Safety Plan has been updated and that the cause or causes of the EHS KPI Deduction has or have been rectified.

67.6 The Infraco shall submit a valid VAT invoice to **tie** and payment will become due to the Infraco on receipt by **tie** of such valid VAT invoice (the "**Construction Payment Due Date**"). The final date for payment by **tie** to the Infraco of a valid VAT invoice shall be the date occurring 15 Business Days after the Construction Payment Due Date.

67.7 If the Infraco is late in submitting its application for payment to **tie** by more than 3 Business Days after the required timescales set out in Clause 67.1, payment in respect of any amount certified in a Construction Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment by **tie** to the Infraco of such valid VAT invoice shall be the date occurring 15 Business Days after the first date of the Reporting Period following receipt of the valid VAT invoice.

67.8 NOT USED

67.9 The Infraco and **tie** acknowledge that:

67.9.1 a maximum of only one Application for Milestone Payment may be made under this Clause 67.9.1 in any Reporting Period; and

67.9.2 the amount to be specified for payment in any Construction Interim Certificate in respect of a Milestone or Critical Milestone shall not exceed the amount specified in Schedule Part 5 (*Pricing*) in relation to the achievement of the Milestone or Critical Milestone to which such Construction Interim Certificate relates.

Adjustment

67.10 Without prejudice to Clause 67.5, any Milestone Payments or Critical Milestone Payments set out in Schedule Part 5 (*Pricing*) shall not be adjusted except by the express written agreement of **tie** or where there has been a Permitted Variation.

67.11 NOT USED

67.12 NOT USED

67.13 NOT USED

Retention and Condition Precedent to Payment

- 67.14 If Infraco fails to procure a collateral warranty from a Key Sub-Contractor in accordance with Clause 28.7 (in circumstances where Clause 28.10 do not apply), **tie** shall be entitled to retain any payments due to be made by it to the Infraco in respect of work executed by such Key Sub-Contractor. This retention shall be released by **tie** upon the provision of such collateral warranty as requested by **tie**.
- 67.15 Following a request from **tie** in accordance with Clause 74.10, any payment to the Infraco shall (save as after mentioned) be conditional upon the Infraco having provided any collateral warranty requested by **tie** under Clause 74.7, provided that the inability to provide a collateral warranty pursuant to Clause 74.10 shall not be a reason for withholding payment if **tie** is satisfied that Infraco has used all reasonable endeavours to provide a collateral warranty as provided for in Clause 74.10.

68. PAYMENT IN RESPECT OF MAINTENANCE SERVICES

Maintenance Services Payment

- 68.1 Subject to the terms of this Agreement, in respect of the provision of the Maintenance Services, **tie** shall pay to the Infraco the Maintenance Services Payment calculated in accordance with Schedule Part 6 (*Maintenance Payment Regime*) together with any other fees, costs and/or expenses in respect of any repairs made pursuant to Clause 52 (*Maintenance*), adjustments pursuant to and Permitted Variations or any other sums due to the Infraco in terms of this Agreement.

Application for Payments

- 68.2 The Infraco shall submit each application for payment in respect of Maintenance Services or in respect of any other costs or expenses which have been expressly approved by **tie** and/or to which the Infraco is entitled in accordance with this Agreement for the previous Reporting Period, to **tie's** Representative within 3 Business Days following the Reporting Period End Date and following submission to **tie** of the Service Quality Report pursuant to Clause 56.3.
- 68.3 Each application for payment shall set out:
- 68.3.1 the Maintenance Services Payment claimed by the Infraco which has been calculated in accordance with Schedule Part 6 (*Maintenance Payment Regime*);

68.3.2 any repairs made pursuant to Clause 52 (*Maintenance*) including a breakdown of the costs;

68.3.3 any other agreed adjustments pursuant to a Permitted Variation; and

68.3.4 any other sums due to or from the Infraco under and/or arising out of this Agreement in accordance with its terms

(together with reasonable supporting documentation establishing the basis of such sums being claimed).

68.4 **tie** shall procure that **tie's** Representative shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary, certify by notice in writing (a "**Maintenance Services Interim Certificate**") to the Infraco that part of the sum claimed in the application for payment which is approved by **tie** and give reasons why any part of the sum claimed has not been certified in the Maintenance Services Interim Certificate and the value of the sums involved no later than 5 Business Days after the date on which application for payment was received by **tie** in accordance with Clause 68.2.

68.5 The Infraco shall submit a valid VAT invoice to **tie** and payment will become due to the Infraco upon receipt by **tie** of such valid VAT invoice (the "**Maintenance Payment Due Date**"). The final date for payment by **tie** to the Infraco of a valid VAT invoice shall be the date occurring 15 Business Days after the Maintenance Payment Due Date.

68.6 If the Infraco is late in submitting its application for payment to **tie** by more than 3 Business Days after the required timescales set out in Clause 68.2, payment in respect of any amount certified in a Maintenance Services Interim Certificate shall become due to the Infraco on the date of receipt of the relevant valid VAT invoice by **tie** in respect of the late application for payment, and the final date for payment by **tie** to the Infraco of such valid VAT invoice shall be the date occurring 15 Business Days after the first date of the Reporting Period following receipt of the valid VAT invoice.

68.7 NOT USED.

Adjustment

68.8 Without prejudice to Clause 68.4, any Maintenance Services Payments shall not be adjusted except by the express written agreement of **tie** or where there has been a Permitted Variation.

68.9 NOT USED

68.10 NOT USED

68.11 NOT USED

Retention and Condition Precedent to Payment

68.12 If, Infraco fails to procure a collateral warranty from a Key Sub-Contractor in accordance with Clause 28.7 (in circumstances where Clause 28.10 do not apply), **tie** shall be entitled to retain any payments due to be made by it to the Infraco in respect of work executed by such Key Sub-Contractor. This retention shall be released by **tie** upon the provision of such collateral warranty as requested by **tie**.

68.13 Following a request from **tie** in accordance with Clause 74.10, any payment to the Infraco shall (save as after mentioned) be conditional upon the Infraco having provided any collateral warranty requested by **tie** under Clause 74.7, provided that the inability to provide a collateral warranty pursuant to Clause 74.10 shall not be a reason for withholding payment if **tie** is satisfied that Infraco has used all reasonable endeavours to provide a collateral warranty as provided for in Clause 74.7.

69. INTEREST ON LATE PAYMENTS AND SET-OFF

Interest on late payments

69.1 In the event of a failure by **tie** to make payment in accordance with Clause 67 (*Payment in Respect of Applications for Milestone Payments*) or Clause 68 (*Payment in Respect of Maintenance Services*), **tie** shall pay to the Infraco interest upon any payment not paid by the final date for payment at a rate per annum equivalent to 2 per cent (2%) above the base rate of The Royal Bank of Scotland plc current on the date upon which such payment first becomes overdue adjusted to reflect any changes to the rate during the period over which the payment remains overdue.

69.2 Pursuant to Clause 69.1 or otherwise in accordance with this Agreement, in the event that the Party to whom payment is due, suffers a demonstrable cost of currency exchange hedge as a result of an exchange rate fluctuation between the pound sterling and the Euro which is connected to late payments relating to the Tram Supply Agreement, then the Party due to make payment shall be liable for this amount to the Party to whom the payment is due.

Set-Off

69.3 Subject to Clause 69.4, **tie** may deduct any amount payable by the Infraco to **tie** (whether by way of damages or in respect of any loss or expense sustained by **tie** by reason of the Infraco's breach of this Agreement) from any other payment or payments due to be made to the Infraco by **tie** under this Agreement.

69.4 Any notice of intention to withhold payment shall be served by **tie** at least ten Business Days prior to the final date for payment calculated in accordance with Clause 67.6 or Clause 68.5 (as appropriate) and such notice shall state the sums being withheld and the detailed reason or detailed reasons for such withholding. Where an effective notice of intention to withhold payment is given, but on the matter being referred to the Dispute Resolution Procedure, it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than:

69.4.1 7 days from the date of the decision; or

69.4.2 the date which, apart from the notice, would have been the final date for payment;

whichever is the later.

69.5 The Infraco shall be entitled to payment of interest as provided in Clause 69.1 in respect of the relevant part of any payments which have been withheld in accordance with Clause 69.3 but are subsequently determined as being payable by **tie** to the Infraco either by agreement between the Parties or a decision following a referral to the Dispute Resolution Procedure. The interest shall be calculated for the period between the date when the relevant part of the payment should have been paid but for the notice of intention to withhold payment and the date on which payment is made by **tie** in accordance with Clause 69.4.

69.6 The Infraco shall not be entitled to retain or set-off any amount owed to it by **tie** against any amount due to **tie** by it.

70. VALUE ADDED TAX

70.1 The Infraco shall be deemed to have allowed in its tender for the tax payable by it as a taxable person to the Commissioners of Customs and Excise being tax chargeable on any taxable supplies to **tie** which are to be made under the Agreement.

70.2 All certificates issued by **tie** or **tie's** Representative under Clauses 67.5 and 68.4 shall be net of Value Added Tax. In addition to the payments due under such certificates **tie** shall separately

identify and pay to the Infraco any Value Added Tax properly chargeable by the Infraco on the supply to **tie** of any goods and/or services by the Infraco under this Agreement.

- 70.3 If any dispute, difference or question arises between either **tie** or the Infraco and the Commissioners of Customs and Excise in relation to any tax chargeable or alleged to be chargeable in connection with this Agreement or the Infraco Works, each shall render to the other such support and assistance as may be necessary to resolve the dispute, difference or question.
- 70.4 Clause 97 (*Dispute Resolution Procedure*) shall not apply to any dispute, difference or question arising under this Clause 70 (*Value Added Tax*).
- 70.5 Where under this Agreement one Party is to reimburse or indemnify another Party in respect of any payment made or cost incurred by the other Party, the first Party shall also reimburse any VAT paid by the other Party in question which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other Party in question (or for any person with whom the indemnified party is treated as a member of a group for VAT purposes) under sections 25 and 26 of the Value Added Tax Act 1994.

71. LABOUR TAX AND LANDFILL TAX FLUCTUATIONS

- 71.1 The rates and prices contained in Schedule Part 4 (*Pricing*) and the Contract Price Analysis shall be deemed to take account only of the levels and incidence in force on the Effective Date:
- 71.1.1 the taxes, levies, contributions, premiums or refunds (including national insurance contributions but excluding income tax and any levy payable under the Industrial Training Act 1982 or any statutory re-enactment or amendment thereof for the time being in force) which are by law payable by or to the Infraco or anyone carrying out any part of the Infraco Works under the instruction of the Infraco in respect of their workpeople engaged on the Infraco Works;
- 71.1.2 any landfill tax payable by the Infraco or anyone carrying out any part of the Infraco Works under the instruction of the Infraco pursuant to the Finance Act 1996 (sections 39-71 and Schedule 5) and the Landfill Tax Regulations 1996 or any statutory re-enactment or amendment thereof for the time being in force; and
- 71.1.3 any aggregate levy payable by the Infraco or anyone carrying out any part of the Infraco Works under the instruction of the Infraco pursuant to the Finance Act 2001 or any statutory re-enactment or amendment thereof for the time being in force;

and shall not take account of any level or incidence of the aforesaid matters foreseeable or known to take effect at some later date.

- 71.2 If after the Effective Date there shall occur any change in the level and/or incidence of any such taxes, levies, contributions, premiums or refunds, the Infraco shall so inform **tie's** Representative and the net increase or decrease shall be taken into account in arriving at the Contract Price. The Infraco shall supply the information necessary to support any consequent adjustment to the Contract Price. All certificates for payment issued after submission of such information shall take due account of the additions or deductions to which such information relates. If the Infraco fails to advise **tie** of any increase within 3 months, the Infraco shall lose its entitlement to claim for an adjustment to the Contract Price.

72. RETURNS OF LABOUR AND INFRACO'S EQUIPMENT

- 72.1 Save in relation to the Tram Supply Obligations, the Infraco shall, if required by **tie's** Representative, deliver to **tie's** Representative a return in such form and at such intervals as **tie's** Representative may reasonably prescribe showing in detail the numbers of the several classes of labour from time to time employed by the Infraco on the Site and such information respecting the Infraco's Equipment as **tie's** Representative may reasonably require. The Infraco shall procure that the Sub-Contractors observe the provisions of this Clause 72 (*Returns of Labour and Infraco's Equipment*).

73. BEST VALUE

- 73.1 The Infraco shall, throughout the Term and to the extent consistent with its obligations under the Agreement, make arrangements to secure continuous improvement in the way in which the Infraco Works are conducted having regard to the Project Vision and, a combination of economy, efficiency and effectiveness.
- 73.2 The Infraco agrees to undertake (or refrain from undertaking) such actions as **tie** shall reasonably request, and shall:
- 73.2.1 prepare and, support and assist **tie** (in compliance with Clause 104 (*Information and Audit Access*)) in preparing best value performance plans and conducting best value reviews in relation to the Infraco Works;
 - 73.2.2 comply with requests for information, data or other assistance made by **tie** in pursuance of its best value assessment; and

- 73.2.3 comply with all requests by **tie** to procure the attendance of specific officers or employees of the Infraco or Infraco Parties at any **tie** meetings at which the Infraco Works are to be discussed.
- 73.3 **tie** may undertake an annual customer satisfaction survey ("**tie Customer Satisfaction Survey**") in order to:
- 73.3.1 assess satisfaction among the public and passengers with the quality, efficiency and effectiveness of the Maintenance Services;
 - 73.3.2 complement preparation of the Annual Service Report; and
 - 73.3.3 monitor compliance by the Infraco with its obligations including its management of the Maintenance Services;
- and the Infraco shall provide reasonable assistance to enable **tie** to undertake the **tie Customer Satisfaction Survey**.
- 73.4 Without prejudice to any other provision in the Agreement (and no later than 2 Reporting Periods prior to the end of any year), the Infraco shall, at its own cost, provide a written report (the "**Annual Service Report**") which shall review the quality and performance of all Maintenance Services measured during the relevant period and show the key issues to be addressed going forward, including customer feedback, operational and maintenance issues and improvement proposals. The customer feedback shall include the results of any **tie Customer Satisfaction Survey** carried out pursuant to Clause 73.3 provided that such results have been supplied to the Infraco not less than 4 weeks prior to the date on which the Annual Service Report is to be submitted to **tie**. The Infraco shall upon written request promptly provide supporting information to verify and audit the information and other material contained in the Annual Service Report (other than the **tie Customer Satisfaction Survey**).
- 73.5 **tie** may make comments on and/or objections and specify omissions in the supporting information or the Annual Service Report and in such case shall provide the Infraco with written comments and/or objections within 30 Business Days of receipt. In the absence of such **tie** comments or objections, the supporting information (or the Annual Service Report) shall be deemed to have been accepted by **tie**.
- 73.6 The Infraco shall, within 30 Business Days of receipt of **tie** comments and/or objections under Clause 73.5, make revisions having regard to such comments and/or objections and resubmit the information and report to **tie**. If the information and reports cannot be agreed by the Parties then the matter will be determined in accordance with the Dispute Resolution Procedure.

- 73.7 If, in **tie's** reasonable opinion, the provision and performance of the Maintenance Services could be more effective, efficient and economic having regard to the Annual Service Report and the **tie** Customer Satisfaction Survey, then **tie** may serve a **tie** Notice of Change pursuant to Clause 80 (*tie Changes*) stating the desired nature and timing of the changes to the provision or performance of the Maintenance Services.
- 73.8 NOT USED
- 73.9 The preparation of best value performance plans will take into account the conclusions from the Annual Service Report and the **tie** Customer Satisfaction Surveys.

PART 14 - BOND, WARRANTIES, INSURANCES AND LIABILITIES

74. BOND, PARENT COMPANY COMPANY GUARANTEES AND COLLATERAL WARRANTIES

- 74.1 On the Effective Date, Infraco shall provide to **tie** a Performance Bond at the maximum amount of £23,000,000 substantially in the form of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) and issued by a surety with a credit rating by Standard & Poors of A- or higher (to be evidenced to **tie**).
- 74.2 On the date on which **tie** issues the Reliability Certificate, the Performance Bond shall be released by **tie**. In the event that the issue of the Reliability Certificate is not expected to be achieved by the date which is twelve (12) months after the currently programmed date of issue for the Reliability Certificate, no later than one month prior to its expiry date the Infraco shall arrange, upon written request by **tie**, for an extension to the validity of the Performance Bond for a period of no less than three months.
- 74.3 The Infraco shall provide to **tie** (issued by a surety with a credit rating by Standard and Poors of A- or higher (to be evidenced by **tie**) substantially in the form of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*), no later than:
- 74.3.1 the Effective Date, a Retention Bond in the amount of £2,000,000 (Two Million Pounds Sterling);
- 74.3.2 the date on which the Certificate of Sectional Completion for Section A is issued, a Retention Bond in the amount of £4,000,000 (Four Million Pounds Sterling);
- 74.3.3 the date on which a Certificate of Sectional Completion for Section B is issued, a Retention Bond in the amount of £6,000,000 (Six Million Pounds Sterling);

- 74.3.4 the date on which a Certificate of Sectional Completion for Section C is issued, a Retention Bond in the amount of £8,000,000 (Eight Million Pounds Sterling);
- 74.3.5 the date on which a Certificate of Sectional Completion for Section D is issued, a Retention Bond in the amount of £10,000,000 Million Pounds Sterling);
- 74.3.6 the date on which a Network Certificate is issued, a Retention Bond in the amount of £6,600,000 (Six Million, Six Hundred Thousand Pounds Sterling);
- 74.3.7 if the Reliability Certificate has not been issued on or before such date, the date which is three months prior to the date referred to at Clause 7.1 of the Retention Bond, a replacement Retention Bond on identical terms to that being replaced, but with an expiry date no earlier than three months after the date referred to in Clause 7.1 of the Retention Bond (the "**New Expiry Date**");
- 74.3.8 if the Reliability Certificate has not been issued on or before such date, the date which is three months prior to the New Expiry Date of any Retention Bond, a replacement Retention Bond on identical terms to that being replaced, but with an expiry date no earlier than three months after the New Expiry Date of the relevant Retention Bond (and such date shall also be deemed to be a New Expiry Date for the purposes of this Clause 74.3.8).
- 74.4 The Retention Bond shall only be released by **tie**, in accordance with its terms:
- 74.4.1 in the case of the Retention Bond provided in accordance with clause 74.3.1, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.2;
- 74.4.2 in the case of the Retention Bond provided in accordance with clause 74.3.2, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.3;
- 74.4.3 in the case of the Retention Bond provided in accordance with clause 74.3.3, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.4;
- 74.4.4 in the case of the Retention Bond provided in accordance with clause 74.3.4, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.5;
- 74.4.5 in the case of the Retention Bond provided in accordance with clause 74.3.5, when a Retention Bond is provided by the Infraco to **tie** in accordance with clause 74.3.6;
- 74.4.6 in the case of the Retention Bond provided in accordance with clause 74.3.6, on issue of a Reliability Certificate.

74.5 In the event that the credit rating of the sureties providing the Retention Bond or the Performance Bond then in force falls to BBB+ or a lower rating by Standard & Poors, **tie** shall be entitled to request the Infraco to provide a replacement for such Retention Bond or Performance Bond (as appropriate), on identical terms to the Retention Bond or Performance Bond (as appropriate) being replaced, but provided by a surety with a credit rating by Standard & Poors of A- or higher and notified to **tie**. If **tie** does not respond to such notification within 2 Business Days, the surety is deemed to be approved.

74.6 Should the Infraco fail to provide a:

74.6.1 Retention Bond pursuant to Clause 74.5; or

74.6.2 Retention Bond in accordance with any of clauses 74.3.2 to 74.3.8; or

74.6.3 Retention Bond in accordance with Clause 74.3.1; or

74.6.4 Performance Bond in accordance with Clause 74.1; or

74.6.5 an extension of validity of any Retention Bond as per Clauses 74.3.7 or 74.3.8

such failure shall be a breach of this Agreement entitling **tie**, in the case of Clause 74.6.1 and 74.6.2, to:

74.6.6 call on the Retention Bond in force at the time of such failure by issuing a Demand Notice (as defined in the relevant Retention Bond); and

74.6.7 withhold payments due to the Infraco from **tie** under this Agreement, up to an amount equal to that amount which would have been stipulated under the relevant Retention Bond had the Infraco complied with its obligations to provide a Retention Bond under Clause 74.5 or any of Clauses 74.3.2 to 74.3.8 (as the case may be). Any sums withheld by **tie** from the Infraco pursuant to this Clause 74.6.6 will be returned by **tie** to the Infraco within 5 Business Days following compliance in full by the Infraco with its obligation to provide a Retention Bond pursuant to Clause 74.5 or any of Clauses 74.3.2 to 74.3.8 (as the case may be).

74.7 Notwithstanding the terms of the Retention Bond, any amount **tie** is entitled to demand under the Retention Bond in respect of:

74.7.1 failure by Infraco to perform or observe any of its duties and/or obligations arising under or in connection with this Agreement; and/or

74.7.2 breach of any provision of this Agreement;

will be reduced by an amount equal to the aggregate of all sums by which the Maximum Performance Payment has been reduced pursuant to the provisions of Schedule Part 6 (*Maintenance Payment Regime*) in respect of the failure or breach to which the demand under the Retention Bond relates.

74.8 NOT USED

74.9 As a Condition Precedent, the Infraco shall procure the execution and delivery to **tie**, of parent company guarantees, in the form set out in part D of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) and, if there is a Change in Control, the Infraco shall, subject to Clause 4.4 of Part D of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) procure the provision of a substitute parent company guarantee or credit enhancement instrument satisfactory to **tie** within 7 Business Days of **tie's** request.

74.10 Within thirty days of any written request from **tie** (or such longer period as the Parties, acting reasonably, may agree), the Infraco shall execute a collateral warranty (in the form set out in Part E of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) or, in respect of the EAL Works, in the form set out in Appendix 8 to Schedule Part 44 (*EAL Works*)) or where such form is not acceptable, in a different form which is acceptable to both Parties (acting reasonably) provided that for the avoidance of doubt Infraco shall not in any circumstances be required to provide a collateral warranty with provisions relating to liability which is greater than that set out in Part E of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) in favour of CEC, TEL and Network Rail, in respect of carrying out the Infraco Works and in favour of EAL in respect of carrying out the EAL Works.

75. WARRANTIES

75.1 Each Infraco Member hereby separately represents, warrants and undertakes to **tie** that to the best of its knowledge, information and belief:

75.1.1 the Infraco Member, the Infraco Member's Infraco Parties or any of their respective representatives or Affiliates or professional advisers or employees or anyone acting on behalf of any of them have not committed any Prohibited Act;

75.1.2 all information which has been given by the Infraco Member, the Infraco Member's Infraco Parties or any of their respective representatives or Affiliates or advisers or employees or anyone acting on behalf of any of them to any member, officer,

employee or adviser of **tie** was, when given true, complete and accurate in all material respects and there is no fact or matter not disclosed in writing to **tie** which:

75.1.2.1 renders any such information untrue, inaccurate or misleading; or

75.1.2.2 might, if disclosed, adversely affect the decision of anyone considering whether or not to contract with the Infraco;

75.1.3 NOT USED

75.1.4 neither the Infraco Member nor the Infraco Member's parent company is involved in any dispute with HM Revenue and Customs, the BundesFinanzAmt or LandesFinanzamt, the European Commission, the Office of Fair Trading, or any other fiscal or regulatory authority in any jurisdiction concerning any matter which could materially and adversely affect the business of the Infraco Member or its ability to perform or the Infraco Works in any way;

75.1.5 the Infraco Member does not use any processes and is not engaged in any activities which involve the misuse of any confidential or proprietary information belonging to any third party;

75.1.6 no claim is presently being assessed and no litigation, arbitration or proceeding is in progress or, to the best of the knowledge and belief of the Infraco Member pending or threatened, against the Infraco Member or any of its management or assets which might have an adverse effect on the ability of the Infraco Member or the Infraco to perform the obligations in this Agreement;

75.1.7 there has been no material adverse change to the financial condition of the Infraco Member or the Infraco Member's parent company guarantor since the latest audited accounts prior to the Effective Date including any matter resulting in a downgrade of the Infraco Member's or the Infraco Member's parent company guarantor's credit rating with any commercially acknowledged independent rating agency reporting the construction sector in the UK or the Federal Republic of Germany; and

75.1.8 the performance of the Infraco Works does not create any situation in which a conflict of interest arises for the Infraco Member.

75.2 Each Infraco Member hereby represents, warrants and undertakes to **tie** to the best of its knowledge and belief that the Infraco's provision of any Deliverables and the use by **tie** of any

of the Deliverables provided to it as part of the Infraco Works has not infringed and shall not infringe any third party's Intellectual Property Rights;

75.3 Each of the warranties, representations and undertakings given under Clauses 75.1.1 to 75.2 shall be construed as a separate and independent warranty, representation and undertaking and shall not be limited or restricted by reference to or inference from any other terms of this Agreement.

75.4 The Infraco Member affected shall immediately disclose in writing to **tie** any event or circumstance which may arise or become known to it after the Effective Date which is materially inconsistent with any of the warranties, representations or undertakings given under Clauses 75.1.1 to 75.2 or which has or is likely to have a material adverse effect on the Infraco Works.

75.5 Each Infraco Member hereby separately represents, warrants and undertakes to **tie** that it:

75.5.1 is duly incorporated under the laws of England and Wales and has the power to own its own assets and carry on its own business; and

75.5.2 has full power and authority (and does not require the consent, authority or licence of any third party) to enter into and perform this Agreement which constitutes a valid and binding obligation on the Infraco in accordance with its terms; and

75.5.3 will not, by performing its obligations under this Agreement, be in breach of any undertaking, agreement or legal obligation of any nature in respect of any third party or of any applicable Law so as to have a material adverse effect on its ability to discharge its obligations under this Agreement;

76. REQUIRED INSURANCES

Required Insurances

76.1 Each Infraco Member shall, at its own cost, procure that each of the Required Insurances is taken out and comes into effect on the relevant date specified in each "Period of Insurance" set out in Part 1 of Schedule Part 11 (*Required Insurances*) and shall maintain the Required Insurances in full force and effect until the relevant date specified in each "Period of Insurance" set out in Part 1 of Schedule Part 11 (*Required Insurances*), provided that each such Required Insurance is available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status as at the Effective Date and discipline as the Infraco Members.

- 76.2 Each Infraco Member shall procure that all Required Insurances shall:
- 76.2.1 be maintained in accordance with Part 1 of Schedule Part 11 (*Required Insurances*);
and
 - 76.2.2 be placed at all times with insurers authorised to carry out insurance business in the United Kingdom and confirmed in writing as acceptable by **tie** (such written acceptance not to be unreasonably withheld or delayed).
- 76.3 Neither Infraco Member shall make any material alteration to the terms of the Required Insurances (including material changes to the level of deductibles) without **tie's** prior approval (which approval shall not be unreasonably withheld). If any such material alteration to the Required Insurances is made, the Infraco shall complete the questionnaire set out in Part 3 of Schedule Part 11 (*Required Insurances*), duly endorsed by its insurance broker. If the insurer makes or attempts to make any material alteration or purports to withdraw cover, the Infraco Member shall promptly give notice of this to **tie**.
- 76.4 Each Infraco Member shall ensure that each of its insurance brokers gives **tie** as soon as reasonably practicable after any policy of Required Insurance is taken out, replaced or renewed, a letter of undertaking in the form set out in part 2 of Schedule Part 11 (*Required Insurances*).
- 76.5 Each Infraco Member shall provide satisfactory evidence to **tie** that the Required Insurances have been effected. Thereafter, each Infraco Member shall upon request produce to **tie** receipts for the payment of current insurance premiums or equivalent documentary evidence to confirm that such Required Insurances are being properly maintained, and on the anniversary of the Effective Date and on each subsequent anniversary thereof until the date of expiry or earlier termination, each Infraco Member shall complete an insurance questionnaire set out in part 3 of Schedule Part 11 (*Required Insurances*) in relation to the Required Insurances to be taken out by the Infraco and submit such completed questionnaire to **tie** as soon as reasonably practicable. If an Infraco Member defaults in insuring or continuing to maintain the Required Insurances, **tie** may insure against any risk in respect of which such default has occurred and recover any premiums from the Infraco as a debt immediately due and payable.
- 76.6 Each Infraco Member shall:
- 76.6.1 procure that the Required Insurances contain a waiver of subrogation against **tie**, any **tie** Party and the named insured parties as set out in part 1 of Schedule Part 11 (*Required Insurances*) save in respect of fraud or deliberate non-disclosure; and

- 76.6.2 where an Infraco Member is obliged to effect any Required Insurances, not bring any claim or action against **tie** (or any **tie** Party), in respect of any losses, damages, liabilities, costs, expenses and charges in circumstances where and to the extent that an Infraco Member could recover such losses, damages, costs, expenses and charges under such insurance, provided that, to avoid doubt, this Clause 76.6.2 shall not by itself prevent an Infraco Member from claiming against **tie** (or any **tie** Party) in respect of a breach of this Agreement by **tie** or any **tie** Party for any losses, damages, costs, expenses and charges arising from such breach not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent of such losses, damages, costs, expenses and charges exceeds the greater of the insurance placed or the minimum limit of indemnity required in respect of such insurance under part 1 of Schedule Part 11 (*Required Insurances*).
- 76.7 Neither Infraco Member shall take any action or fail to take any action or (insofar as it is reasonably within its power) permit or allow others to take or fail to take any action (in either case including failure to disclose any fact) as a result of which any of the Required Insurances may be rendered void, voidable, unenforceable, suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.
- 76.8 The supply to **tie** of any insurance policy or insurance certificate or renewal certificate or other evidence of compliance with this Clause 76 (*Required Insurances*) shall not imply, or be taken as, acceptance by **tie** that:
- 76.8.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
- 76.8.2 in respect of any interests or parties not insured or any risks not insured against, an acceptance by **tie** that the same were uninsurable.
- 76.9 Neither failure to comply nor full compliance with the provisions of this Clause 76 (*Required Insurances*) shall relieve the Infraco Members of their liabilities and obligations under this Agreement.
- 76.10 Each Infraco Member shall apply any proceeds of any policies of insurance maintained in accordance with part 1 of Schedule Part 11 (*Required Insurances*) in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable (unless already paid direct to the third party or employee by the insurer).
- 76.11 Each Infraco Member undertakes with **tie** in relation to the Required Insurances:

76.11.1 to comply with all requirements of the insurers; and

76.11.2 to give notice to **tie** immediately upon the happening of any event which will adversely affect any policy of insurance effected in accordance with this Clause 76 (*Required Insurances*), including the downgrading of the credit rating to A- or lower by Standard & Poors of any party providing any of the Required Insurances.

76.12 Save in relation to the Tram Supply Agreement and/or the Tram Maintenance Agreement in which cases Clause 76.12.1 will apply, the Infraco Members shall immediately inform **tie** in writing if any of the Required Insurances cease to be maintained and/or cease to be available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status as at the Effective Date, and discipline as the Infraco Members. In this event, the Parties shall meet to discuss the means by which any risks previously covered by the Required Insurances should be managed, mitigated or controlled. Any increased or additional premium required by insurers by reason of the Infraco's own claims record or other acts, omissions, matters or things particular to the Infraco Members shall be deemed to be within commercially reasonable rates and terms.

76.12.1 In relation to the Tram Supply Agreement and/or the Tram Maintenance Agreement, the Infraco shall immediately inform **tie** in writing if any of the Required Insurances cease to be maintained and/or cease to be available in the EU insurance market at commercially reasonable rates provided that if the Infraco is procuring that the Tram Supplier and/or the Tram Maintainer (as appropriate) is maintaining such insurance at such rates, **tie** shall undertake in writing to reimburse the Infraco in respect of half of the net cost of such insurance to the Tram Supplier and/or the Tram Maintainer (as appropriate) above commercially reasonable rates. If **tie** undertakes in writing to reimburse the Infraco in respect of half of the net cost of such insurance to the Tram Supplier and/or the Tram Maintainer (as appropriate) above commercially reasonable rates or, if the Infraco procures that the Tram Supplier or Tram Maintainer (as appropriate) effects such insurance at or above commercially reasonable rates, the Infraco shall reimburse **tie** in respect of what the net cost of such insurance to the Tram Supplier or Tram Maintainer (as appropriate) would have been at commercially reasonable rates and terms, and the cost of maintaining any such insurance at rates above commercially reasonable rates by the Tram Supplier or Tram Maintainer (as appropriate) or by the Infraco shall be borne in equal proportions by the Infraco and **tie**.

76.13 Save in relation to the Tram Supply Agreement and/or the Tram Maintenance Agreement in which cases Clause 76.12.1 will apply, each Infraco Member shall fully co-operate with any measures reasonably required by **tie**, including (without limitation) completing any proposals for insurance and associated documents or maintaining such insurance at rates above commercially reasonable rates provided that if the Infraco Members are maintaining such insurance at such rates, **tie** shall pay to the Infraco Members the sum which is half of the additional cost to Infraco Members of maintaining such insurance above commercially reasonable rates.

76.13.1 Infraco shall procure that the Tram Supplier and/or the Tram Maintainer shall, fully co-operate with any measures reasonably required by **tie**, including (without limitation) completing any proposals for insurance and associated documents or maintaining such insurance at rates above commercially reasonable rates if **tie** undertakes in writing to reimburse the Infraco in respect of the net cost of such insurance to the Tram Supplier and/or the Tram Maintainer (as appropriate) above commercially reasonable rates or, if the Infraco procures that the Tram Supplier or Tram Maintainer (as appropriate) effects such insurance at or above commercially reasonable rates, reimbursing the Infraco in respect of what the net cost of such insurance to the Tram Supplier or Tram Maintainer (as appropriate) would have been at commercially reasonable rates and terms.

OCIP Insurances

76.14 The Infraco acknowledges that **tie** has taken out the OCIP Insurances and agrees to comply with the requirements of the insurers with whom the OCIP Insurances are placed and Infraco acknowledges that it is on notice of the form and content of OCIP Insurances. The Infraco agrees that it will intimate to **tie** any act, occurrence or failure which may:

76.14.1 lead to any claim being made under the OCIP Insurances; or

76.14.2 render any of the OCIP Insurances void, voidable, unenforceable, suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

76.15 The Parties shall not take any action or fail to take any reasonable action or (insofar as it is reasonably within its power) permit or allow others to take or fail to take any action (including, in either case, failure to disclose any fact) as a result of which any of the OCIP Insurances may be rendered void, voidable, unenforceable, suspended or impaired in whole or

in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.

- 76.16 Subject to Clause 76.19A, the Infraco shall bear all excesses and deductibles payable in respect of claims made under the OCIP Insurances and the Additional Insurances where any claim arising is due solely to the breach of this Agreement by the Infraco or negligent act or negligent omission of the Infraco or any of the Infraco Parties.
- 76.17 Subject to Clause 76.19A **tie** shall bear all excesses and deductibles payable in respect of claims made under the OCIP Insurances and the Additional Insurances where any claim arising is due solely to the breach of this Agreement by **tie** or negligent act or negligent omission of **tie** and from the date of issue of the Certificate of Service Commencement **tie** shall bear all excesses and deductibles relating to claims under the OCIP and Additional Insurances where such claims do not fall under Clause 76.16. Where **tie** is responsible for such excess and deductibles, **tie** shall pay to the Infraco the amount of any such applicable excess or deductible claimed by the Infraco in accordance with Clause 67 (*Payment in Respect of Applications for Milestone Payments*) or Clause 68 (*Payment in Respect of Maintenance Services*), as appropriate.
- 76.18 Subject to Clause 76.19A, 76.19B and 76.19C **tie** and the Infraco shall be responsible (but only up to the date of the Certificate of Sectional Completion for each Section in respect of Infrastructure Maintenance Services) for bearing all excesses and deductibles payable in equal proportions in respect of claims made under the OCIP Insurances and the Additional Insurances where any claim arising does not fall under Clauses 76.16 or 76.17. **tie** shall pay to the Infraco the amount of any such applicable excess or deductible claimed by the Infraco in accordance with Clause 67 (*Payment in Respect of Applications for Milestone Payments*) or Clause 68 (*Payment in Respect of Maintenance Services*).
- 76.19 **tie** shall maintain at its own cost the OCIP Insurances in full force and effect during the Term. If **tie** fails to maintain or makes any material alteration to the terms (including the level of deductibles) of the OCIP Insurances (or equivalent insurances) at any time during the Term, **tie** shall be responsible for funding replacement or reinstatement of the Infraco Works to the extent that such failure or alteration prevents or reduces the available insurance proceeds which would have otherwise been recoverable through a claim on the OCIP Insurances so as to fund the reinstatement and Infraco shall be relieved of any obligations regarding reinstatement until **tie** provides such funding.

76.19A If **tie** alters the OCIP Insurances so that the level of deductibles is increased under such insurance, **tie** shall in respect of any claim pay for and be responsible for any difference in the excess or deductibles arising from such alteration irrespective of the cause of the claim.

76.19B Where any excesses or deductibles occur as a result of a claim arising due to the breaches or negligent acts or omissions of both Parties, the Parties shall bear such excesses and deductibles in such portions as shall be fair and equitable in all the circumstances, including the extent to which the Parties' breaches or negligent acts or omissions contributed to such claim.

76.19C **tie** shall be liable for payment of any deductible under the OCIP Insurance and the Additional Insurance where claims are made in respect of acts of vandalism whilst Trams are stationed in the Depot or where being used for testing other than whilst under responsibility of the Tram Supplier. Upon the issue of the relevant Tram Commissioning Certificate, **tie** shall be responsible for all deductibles in respect of each Tram and Tram Related Equipment save where the claim arises from the breach of this Agreement or by negligence of the Infraco.

Additional Insurance

76.20 **tie** may ask the Infraco to take out and maintain any annual insurance from time to time in the names of the parties reasonably requested by **tie** (the "**Additional Insurance**"). If Additional Insurance is required, the terms of this Clause 76 (*Required Insurances*) including the provisions which are stated to apply to the "Required Insurances" shall apply with any appropriate adjustment to be agreed between the Parties. The Infraco shall, subject to Clause 76.23, procure that any Additional Insurance shall:

76.20.1 (if **tie** so requires) contain a provision that **tie** and/or any other party reasonably requested by **tie** is named as a co-insured party;

76.20.2 provide that any Additional Insurance shall continue in effect and unaltered for the benefit of the insured parties for at least ninety days after written notice by registered mail of any cancellation (including non-renewal), change, modification or lapse for any reason;

76.20.3 contain a provision that requires the insurer to send copies of all notices of cancellation or alteration or suspension or any other notices given under or in relation to the policy to **tie** promptly upon receiving any notices of cancellation or alteration or suspension or any other notices;

- 76.20.4 contain a provision that a notice of a claim given to the insurer by one of the insured parties under the policy shall, in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all insured parties;
- 76.20.5 contain a provision to the effect (on the basis of non-vitiation/severability) that all the provisions of any Additional Insurance shall operate as if there were a separate policy in effect (save in respect of the sums insured, limits of liability and excesses/deductibles which shall be at the levels stated) for each named insured and that non-compliance with any policy term, condition or warranty and/or misrepresentation or non disclosure of material information by the Infraco or any other co-insured will not affect the rights and/or interests of any co-insured party under any policies effected as Additional Insurance; and
- 76.20.6 ensure that the Additional Insurances are primary, and shall not be brought into contribution with any other policy or policies effected by or on behalf of any of the insured parties,
- 76.21 The Infraco shall supply **tie** with copies of every policy document, insurance certificate and renewal certificate relating to any Additional Insurance (or such other evidence of insurances as may be reasonably required by **tie**) and documentary evidence to the effect that the Required Insurances (other than any Additional Insurance) have been taken out and are being maintained as soon as it is available but in any event no later than 7 days (in respect of certificates) and sixty days (in respect of policies) after the inception of the relevant policies, together with evidence of payment of the premiums and any periodic renewal certificates.
- 76.22 The Infraco shall inform **tie** in writing as soon as reasonably practicable after it receives a claim or becomes aware of the occurrence of any event that may give rise to a claim under any Required Insurance (if related to the Edinburgh Tram Network) or Additional Insurance and will ensure that **tie** is kept fully informed of subsequent action and developments concerning the claim; such written information shall not be required in relation to any claim of less than £50,000 (as Indexed). The Infraco shall take such steps as are necessary or appropriate to ensure that each Infraco Party, in respect of any event or claim of a like nature arising out of or relating to the operation or responsibility of that Infraco Party, or any event or claim of which they become aware, takes in relation to the Infraco like action to that which the Infraco is required to take under this Clause 76.22 in relation to **tie**, and shall inform **tie** promptly of information thus received from any Infraco Party.
- 76.23 At each anniversary of the Effective Date, the Infraco shall provide **tie** with a summary of all claims made under the Required Insurances, where such claims arise out of this Agreement.

Such summary shall include date, circumstances, status and amounts paid and outstanding on each claim.

- 76.24 Without prejudice to any other provision of this Agreement, the Infraco undertakes to the extent it has the right to do so under the relevant policy that it will not (and that each of the Infraco Parties to the extent each respectively has the right to do so under the relevant policy will not) settle any OCIP Insurance or Additional Insurance claim above £50,000 (as Indexed) without the prior written agreement of **tie** (such agreement not to be unreasonably withheld or delayed).
- 76.25 The Infraco shall promptly inform **tie** in writing if any of the Additional Insurances cease to be maintained and/or cease to be available in the EU insurance market at commercially reasonable rates and on commercially reasonable terms to contractors of the same status, as at the date of **tie's** request to Infraco that it takes out the Additional Insurance, and discipline as the Infraco. In this event, the Parties shall meet to discuss the means by which any risks previously covered by the Additional Insurances should be managed, mitigated or controlled and any agreement shall be a **tie** Change. Any increased or additional premium required by insurers by reason of the Infraco's own claims record or other acts, omissions, matters or things particular to the Infraco shall be deemed to be within commercially reasonable rates and terms.
- 76.26 Any request from **tie** that Infraco maintains Additional Insurance shall be a Mandatory **tie** Change. Nothing in this Clause 76 shall oblige Infraco to maintain Additional Insurances on terms which are not available in the EU insurance market.
- 76.27 All insurance proceeds received under OCIP Insurance in respect of physical damage shall be applied to repair, reinstate and replace each part or parts of the Infraco Works in respect of which the proceeds were received. Subject to Clause 76.29, if such proceeds are recovered by **tie**, **tie** shall pay to Infraco the monies recovered, within 5 Business Days of receipt of such monies from the Insurers
- 76.28 Where a claim is made or proceeds of insurance are received or are receivable by **tie** under any OCIP Insurance in respect of physical damage and in respect of a single event (or a series of related events) in an amount in excess of £100,000:
- 76.28.1 the Infraco shall deliver as soon as practicable and in any event within 15 Business Days after the making of the claim a plan prepared by the Infraco for the carrying out of the works necessary ("**Reinstatement Works**") to repair, reinstate or replace ("**Reinstatement Plan**") the Infraco Works which are the subject of the relevant claim

or claims in accordance with Clause 76.27. The Reinstatement Plan shall set out the proposed terms and timetable upon which the Reinstatement Works are to be effected, the final terms of which shall be subject to the prior written approval of **tie**, which approval shall not be unreasonably delayed;

76.28.2 provided that **tie** is satisfied that the Reinstatement Plan will enable the Infraco to comply with Clause 76.27 within a reasonable timescale:

76.28.2.1 the Reinstatement Plan will be adopted;

76.28.2.2 the Infraco shall enter into the contractual arrangement to effect the Reinstatement Works;

76.28.2.3 **tie** agrees and undertakes that, subject to compliance by the Infraco with its obligations under this Clause, and provided that the Infraco procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 76.28.2.2, it shall not exercise any right which it might otherwise have to terminate this Agreement;

76.28.2.4 **tie** undertakes to use reasonable endeavours to assist the Infraco in the carrying out of the Reinstatement Plan; and

76.29 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace the Infraco Works, the Infraco shall carry out the work in accordance with the Employer's Requirements so that on completion of the work, the provisions of the Agreement are complied with, unless the Infraco is otherwise instructed pursuant to a **tie** Change in which case **tie** shall retain the insurance proceeds.

76.30 Where the proper and reasonable costs of carrying out Reinstatement Works exceed the insured amount under the OCIP Insurances **tie** shall pay such excess to Infraco in accordance with Clause 67 (Payment in respect of Application for Milestone Payments) or Clause 68 (Payments in respect of Maintenance Services).

77. INDEMNITY BY INFRACO, LIABILITY AND SOLE REMEDY

77.1 Subject to Clauses 77.2, 77.3, 77.7 and 77.8, the Infraco shall indemnify **tie**, CEC and their respective officers, agents and employees ("**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) which any

of the Indemnified Parties may hereafter incur, become responsible for, or pay out as a result of:

77.1.1 any of the Infraco's or any Infraco Party's negligent or wilful acts, or negligent or wilful omissions in the performance of the Infraco Works; and/or

77.1.2 breach by Infraco of any term or provision of this Agreement including any Law.

Such claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses shall include such claims, suits, losses, liabilities damages, penalties, fines, forfeitures, and the costs and expenses in respect of:

- (a) death or injury to any person;
- (b) loss of or damage to any property (up to OCIP cover level);
- (c) loss of or damage to any part of the Infraco Works (up to OCIP cover level);
- (d) causing **tie** and/or CEC to be in breach of any Law; or
- (e) causing **tie** and/or CEC to be in breach of any of the DPOFA, the Tram Inspector Agreement, the Third Party Obligations and any other undertakings which have been given by **tie** and/or CEC to any third party and which have been notified to the Infraco in writing either (i) prior to the Effective Date; or (ii) at any time as a **tie** Change;
- (f) a breach by Infraco of its obligations under Clause 18 (Land Consent, Permanent Land and Temporary Sites);
- (g) causing **tie** and/or CEC to be in breach of any Land Consent relating to the Permanent Land or the Temporary Land; or
- (h) infringement or alleged infringement of a third party's Intellectual Property Rights; or

For the avoidance of doubt, Infraco shall not be liable to indemnify the Indemnified Parties in respect of any claim arising from or in connection with a third party agreement or undertaking the terms of which had not been notified to the Infraco in writing prior to the Effective Date.

77.2 The exception referred to in Clauses 24.5, 49.2 and 77.1, which is the responsibility of **tie**, is death of, or injury to, persons or loss of or damage to property resulting from any act, omission, neglect, or breach of statutory duty by the Indemnified Parties or other contractors (not being employed by the Infraco or any Infraco Party) or for or in respect of any claims,

suits, losses, liabilities, damages, penalties, fines, forfeitures, and the costs and expenses, demands, proceedings, damages, costs, charges and expenses in respect thereof or in relation thereto.

77.3 The Infraco's liability to indemnify the Indemnified Parties under Clause 77.1 shall be reduced in proportion to the extent that the act, omission, neglect, or breach of statutory duty of the Indemnified Party or other contractors (not being the Infraco or any Infraco Party) may have contributed to the said death, injury, loss or damage.

77.4 Subject to Clause 78 and to the extent such liability is not insured under OCIP, the Required Insurances or the Additional Insurances, **tie** shall indemnify the Infraco against claims which arise as an unavoidable consequence of the Infraco carrying out the Infraco Works pursuant to and in full compliance with this Agreement.

77.5 The Infraco shall not be relieved of any liability under Clause 77.1 by reason of:

77.5.1 any approvals, comments, instructions, consents, attendance at meetings relating to the Infraco Works or advice from **tie** or Network Rail; or

77.5.2 the fact that any act or thing may have been done by **tie** or Network Rail themselves on behalf of the Infraco and/or in accordance with any requirement stipulated by **tie** or Network Rail.

77.6 Nothing in this Agreement shall exclude or limit the liability:

77.6.1 of either Party for:

77.6.1.1 death or personal injury caused by that Party's negligence or the negligence of anyone for whom that Party is vicariously liable; or

77.6.1.2 fraud or fraudulent misrepresentation;

77.6.2 NOT USED

provided that nothing in this Clause 77.6 shall confer on either Party rights or remedies that they would not otherwise have.

77.7 Notwithstanding anything to the contrary contained in this Agreement and/or the Retention Bond and the Performance Bond, the liability of the Infraco under or in connection with this Agreement or as a consequence of termination of this Agreement whether in contract or delict, in negligence, for breach of statutory duty or otherwise (including, for the avoidance of

doubt, pursuant to any indemnity) shall (other than in respect of personal injury or death) when aggregated with:

- (i) payments (if any) made by the Guarantors (or either of them) to ~~tie~~ under the Parent Company Guarantees; and
- (ii) payments (if any) made to CEC, Network Rail, EAL and TEL under the collateral warranties or any other collateral warranty granted by Infraco in accordance with this Agreement,
- (iii) the total amount of deductions (stated as a positive amount) applied to the Maintenance Contract Price in accordance with Schedule Part 6 (*Maintenance Payment Regime*),

be limited to the Liability Cap provided always that the calculation of the quantum of such limitation

77.7.1 shall exclude the proceeds of the Retention Bond and the Performance Bond and any cash retention or proceeds of any bond provided pursuant to Clauses 96 ;and

77.7.2 shall exclude amounts paid to the Infraco under the OCIP Insurances, and/or any Additional Insurances;

77.7.3 does not relate to liabilities which are covered by the proceeds of the Required Insurances or would have been so covered had the Infraco complied with its obligations under this Agreement; and

77.7.4 does not relate to liabilities which would have been covered by the proceeds of the Required Insurances, the OCIP Insurances and/or any Additional Insurances but for the application of any deductible under such Required Insurances, the OCIP Insurances and/or any Additional Insurances.

77.8 Subject to Clause 77.6 and Clause 77.4 and save for payments expressly agreed as payable pursuant to Clause 88.8, neither Party shall be entitled to claim damages or loss (i) for breach of this Agreement (ii) in delict (including negligence), (iii) for breach of statutory duty or (iv) on any other basis whatsoever (including, for the avoidance of doubt pursuant to any indemnity) to the extent that such damages or loss claimed by that Party are for Indirect Losses suffered by that Party, any of the Indemnified Parties or an Infraco Party, as the case may be, provided that nothing in this Clause 77.8 shall affect either Party's liability to the other Party or to any of the Indemnified Parties, in respect of any claim, action, proceedings or

demand against such other Party or any of the Indemnified Parties by a third party in connection with any Indirect Losses suffered by that third party, save that the Infraco shall have no liability with regard to uninsured third party economic and consequential loss, except as provided specifically pursuant to Schedule Part 43 (*Reserve Account*). **tie** shall take responsibility for any claim made for uninsured third party economic and consequential loss against **tie** and the Indemnified Parties or made against the Infraco and the provisions of Schedule Part 43 (*Reserve Account*) shall apply.

- 77.9 The Infraco shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Infraco Party. The Infraco shall be responsible for the selection, performance, acts, defaults, omissions, breaches, delict and offences of any Infraco Party. All references in this Agreement to any act, default, omission, breach, delict or offence of the Infraco shall be construed to include any such act, default, omission, breach or delict of any Infraco Party.
- 77.10 The Parties acknowledge and agree that the only rights available to them to terminate this Agreement are those expressly set out in this Agreement and that neither Party shall be entitled to exercise a right to terminate or rescind or accept the repudiation of this Agreement under any other right whether arising in common law or statute or otherwise howsoever (other than for fraud or a fraudulent misrepresentation).
- 77.11 Both Parties acknowledge and agree that the express rights provided in this Agreement in relation to termination and the calculation and payment of amounts due following such termination are exclusive and are in place of (and not cumulative with) any other rights or remedies which might arise as a consequence of such termination or expiry. Each Party hereby waives all other rights and remedies arising from such termination, whether express or implied, arising by common law (including in delict), by statute or otherwise howsoever provided that nothing in this Clause 77.11 exclude the right of either Party to claim remedies expressly conferred on them by this Agreement.
- 77.12 Except in respect of usable material necessarily generated from the Permanent Land in the carrying out and completion of the Infraco Works or where otherwise stated in this Agreement the Infraco shall pay all tonnage and other royalties rent and other payments or compensation (if any) for getting stone sand, gravel, clay or other materials required for the Infraco Works.

Criminal Liability

- 77.13 Where the act or default of the Infraco or of any Infraco Parties, causes **tie** to commit an offence, the Infraco shall immediately take any measure necessary to ensure that that act or default, no longer causes **tie** to commit that offence.
- 77.14 Where **tie** reasonably suspects that such an act or default is about to take place and it reasonably believes that this will result in **tie** committing an offence, **tie** may issue an instruction to the Infraco to remedy the act or default forthwith and the Infraco shall comply with the said instruction.

Latent Defects Liability

- 77.15 Save in respect of any claims notified in writing to the Infraco by **tie** and in respect of which **tie** has invoked Clause 97 (*Dispute Resolution Procedure*) no later than 3 months after the expiry of the period of 12 years from the issue of the Reliability Certificate, the Parties agree that Infraco shall have no liability and no actions or proceedings shall be commenced against Infraco or either of the Infraco Members in respect of any latent defects in the Infraco Works after the period of 12 years from the issue of the Reliability Certificate.

78. CONDUCT OF CLAIMS

- 78.1 Subject always to the requirements of the Required Insurances, the OCIP Insurances and/or any Additional Insurance:
- 78.1.1 if **tie** receives any notice, demand, letter or other document concerning any claim from which it appears that **tie** is or may become entitled to indemnification under this Agreement ("**Claim**"), **tie** shall notify the Infraco as soon as reasonably practicable and shall supply a copy of the relevant Claim to the Infraco.
- 78.1.2 where it appears that **tie** is, or may become, entitled to indemnification from the Infraco in respect of the liability arising out of the act or omission which is the subject of the Claim, the Infraco shall take conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations and shall be entitled to resist the Claim in the name of **tie** and **tie** will give the Infraco all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim.
- 78.2 In relation to any Claim subject to Clause 78.1.2:

- 78.2.1 the Infraco shall keep **tie** fully informed and consult with it about material elements of the conduct of the Claim;
- 78.2.2 the Infraco shall not bring the name of **tie** into disrepute; and
- 78.2.3 the Infraco shall not pay or settle such Claims without the prior written consent of **tie**, such consent not to be unreasonably withheld or delayed.
- 78.3 **tie** shall be free to take steps in the proceedings, pay or settle any Claim on such terms as it thinks fit (and without prejudice to its rights and remedies under this Agreement) if the Infraco fails to notify **tie** of its intention to conduct the relevant Claim within 20 Business Days of the notice from **tie** under Clause 78.1.1 above or the Infraco notifies **tie** that it does not intend to take conduct of the Claim.
- 78.4 NOT USED
- 78.5 If, in controlling and contesting any Claim, **tie** takes or fails to take any action in relation to such Claim which it might reasonably be expected to take or not take (as the case may be) which terminates or reduces any entitlement of the Infraco to recover any part of the Claim from any insurer under any of the Required Insurances, the OCIP Insurances and/or any Additional Insurance, the liability of the Infraco to indemnify **tie** in respect of such Claim shall be reduced by an amount equal to such part or, as the case may be, the amount of the reduction thereof (except in the case where **tie** could not reasonably have been expected to have known that the Infraco's entitlement could be so terminated or reduced).
- 78.6 If the Infraco pays to **tie** an amount in respect of an indemnity and **tie** subsequently recovers (whether by payment, discount, credit, saving, relief, other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Claim, **tie** shall forthwith repay to the Infraco whichever is the lesser of:
- 78.6.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses properly incurred by **tie** in recovering the same; and
- 78.6.2 the amount paid to **tie** by the Infraco in respect of the Claim under the relevant indemnity;
- provided that **tie** shall use reasonable endeavours to pursue such recovery and provided further that the Infraco shall be repaid only to the extent that the amount of such recovery aggregated

with any sum recovered from the Infraco exceeds any loss sustained by **tie** in respect of the Claim.

- 78.7 In the event that the Infraco is entitled to be indemnified by **tie** pursuant to Clause 77.4 in respect of a claim, the provisions of Clause 78.1, 78.2, 78.5 and 78.6 shall apply as if references to "**tie**" were references to "Infraco" and vice versa.

PART 15 - CHANGES

79. MANAGEMENT OF VARIATIONS

- 79.1 Any variations proposed to the Infraco Works shall be dealt with as follows:

79.1.1 **tie** Changes shall be dealt with in accordance with Clause 80 (*tie Changes*);

79.1.2 Infraco Changes shall be dealt with in accordance with Clause 81 (*Infraco Changes*);

79.1.3 Small Works Changes shall be dealt with in accordance with Clause 82 (*Small Works Changes*);

79.1.4 Accommodation Works Changes shall be dealt with in accordance with Clause 83 (*Accommodation Works Changes*);

79.1.5 Qualifying Changes in Law shall be dealt with in accordance Clause 84 (*Qualifying Changes in Law*);

79.1.6 Network Expansions shall be dealt with in accordance with Clause 86 (*Network Expansions*);

79.1.7 Labour tax and landfill tax fluctuations shall be dealt with in accordance with Clause 71 (*Labour Tax and Landfill Tax Fluctuations*); and

79.1.8 where applicable, Schedule Part 4 (*Pricing*).

- 79.2 The Infraco shall maintain a change control register which shall detail the status and give summary information on all withdrawn, pending and confirmed variations under this Agreement. The Infraco shall provide a copy of the change control register to **tie** and the Infraco shall provide updates of the change control register to **tie** every Reporting Period.

- 79.3 No variation ordered in accordance with this Agreement shall in any way vitiate or invalidate this Agreement.

80. TIE CHANGES

80.1 Unless expressly stated in this Agreement or as may otherwise be agreed by the Parties, **tie** Changes shall be dealt with in accordance with this Clause 80 (*tie Changes*). If **tie** requires a **tie** Change, it must serve a **tie** Notice of Change on the Infraco.

80.2 A **tie** Notice of Change shall:

80.2.1 set out the proposed **tie** Change in sufficient detail to enable the Infraco to calculate and provide the Estimate in accordance with Clause 80.4 below;

80.2.2 subject to Clause 80.3, require the Infraco to provide **tie** within 18 Business Days of receipt of the **tie** Notice of Change with an Estimate, and specify whether any competitive quotes are required and;

80.2.3 set out how **tie** wishes to pay (where relevant) for the proposed **tie** Change.

80.2.4 set out any changes which **tie** believe are required to the terms of this Agreement and/or the SDS Contract to give effect to the proposed **tie** Change

80.3 If, on receipt of the **tie** Notice of Change, the Infraco considers (acting reasonably) that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days, then the Infraco shall, within 5 Business Days (during the period prior to issue of the Reliability Certificate) and within 10 Business Days (at any time after issue of the Reliability Certificate) of receipt of such **tie** Notice of Change, deliver to **tie** a request for a reasonable extended period of time for return of the Estimate, such extended period to be agreed by the Parties, both acting reasonably.

80.4 As soon as reasonably practicable, and in any event within 18 Business Days after having received a **tie** Notice of Change (or such longer period as may have been agreed by the Parties, pursuant to Clause 80.3 or as required by Clause 80.11), the Infraco shall deliver to **tie** the Estimate. The Estimate shall include the opinion of the Infraco (acting reasonably) in all cases on:

80.4.1 whether relief from compliance with any of its obligations under this Agreement is required during or as a result of the implementation of the proposed **tie** Change;

80.4.2 any impact on the performance of the Infraco Works and the performance of the Edinburgh Tram Network;

80.4.3 any impact on the Programme and any requirement for an extension of time;

- 80.4.4 any Consents, Land Consents and/or Traffic Regulation Orders (and/ or any amendment or revision required to existing Consents, Land Consents and/ or Traffic Regulation Orders) which are required in order to implement or as a result of the implementation of the proposed **tie** Change and any update of the Consents Programme which will be required as a result;
 - 80.4.5 any new agreements with third parties which may be required to implement the **tie** Change;
 - 80.4.6 any amendment required to the Agreement or the Key Subcontracts as a result of the implementation of the proposed **tie** Change;
 - 80.4.7 the proposed method of delivery of the proposed **tie** Change;
 - 80.4.8 proposals to mitigate the impact of the proposed **tie** Change;
 - 80.4.9 confirmation of the changes to the terms of this Agreement and/or the SDS Contract proposed by **tie** and any further changes the terms of this Agreement and/or the SDS Contract necessary to give effect to the proposed **tie** Change; and
 - 80.4.10 any increase or decrease in any sums due to be paid to the Infraco under this Agreement (including the value of any Milestone Payments and the scheduling of such Milestone Payments) in order to implement, and as a direct consequence of implementation of, the **tie** Change, such increase or, decrease to be calculated in accordance with this Clause 80.
- 80.5 Where the **tie** Change, in the opinion of the Infraco acting reasonably, impacts the ability to deliver the Maintenance Services in accordance with Clause 52 (Maintenance) the Estimate delivered pursuant to Clause 80.4 shall include any net increase or decrease in:
- 80.5.1 in the case of demonstrable impact (taking into account any impact of previously implemented **tie** or Infraco Changes) on routine maintenance activity:
 - 80.5.1.1 the consequential change in labour resources and management time required for each affected maintenance element of the Infraco Works; and
 - 80.5.1.2 the consequential change in materials, plant and equipment required; or
 - 80.5.2 in the case of demonstrable impact (taking into account any impact of previously implemented **tie** or Infraco Changes) on renewals maintenance activity:

80.5.2.1 the scope of required renewals work or services and frequency of renewals;

80.5.2.2 the resulting change in labour resources and management time required for the renewal work; and

80.5.2.3 the resulting change in materials and plant and equipment (if any) used to effect the renewals.

80.6 The valuation of any **tie** Changes made in compliance with this Clause 80 (*tie Changes*) shall be carried out as follows:

80.6.1 by measurement and valuation at the rates and prices for similar work in Appendix F to Schedule Part 4 (*Pricing*) or Schedule Part 7 (*Maintenance Contract Price Analysis*) as the case may be in so far as such rates and prices apply;

80.6.2 if such rates and prices do not apply, by measurement and valuation at rates and prices deduced therefrom insofar as it is practical to do so;

80.6.3 if such rates and prices do not apply and it is not practicable to deduce rates and prices therefrom, by measurement and/or valuation at fair rates and prices in accordance with Appendix G Schedule Part 4 (*Pricing*) and Appendix F Schedule Part 7 (*Maintenance Contract Price Analysis*);

80.6.4 if the value of the **tie** Change cannot properly be ascertained by measurement and/or valuation, the value of the resources and labour employed thereon, as appropriate and in accordance with Appendix G to Schedule Part 4 (*Pricing*) and Appendix F to Schedule Part 7 (*Maintenance Contract Price Analysis*);

provided that where any **tie** Change would otherwise fall to be valued under Clauses 80.6.1 and 80.6.2 above, but the instruction therefor was issued at such a time or was of such content as to make it unreasonable for the alteration or addition to be so valued, the value of the **tie** Change shall be ascertained by measurement and/or valuation at fair rates and prices.

80.7 The Infraco shall include in the Estimate evidence demonstrating that:

80.7.1 the Infraco has used all reasonable endeavours to minimise (including by the use of competitive quotes where appropriate in the case of construction works and where reasonable in the circumstances that new or additional sub contractors are required to deliver the change in the case of Maintenance Services or where construction works

are undertaken during the maintenance phase) any increase in costs and to maximise any reduction of costs ;

80.7.2 the Infraco has, where required by **tie** and where appropriate and practicable, sought competitive quotes from persons other than the Infraco Parties in pursuance of its obligation under Clause 80.7.1 above;

80.7.3 the Infraco has investigated how to mitigate the impact of the **tie** Change; and

80.7.4 the proposed **tie** Change will, where relevant, be implemented in the most cost effective manner (taking into account the reasonable requirements of Infraco in relation to quality) including showing where reasonably practicable that when any expenditure is incurred, relevant Changes in Law that are reasonably foreseeable at the time of consideration of the specific **tie** Change and which relate to that **tie** Change have been taken into account by the Infraco.

80.8 If the Infraco does not intend to use its own resources to implement any proposed **tie** Change, it shall:

80.8.1 demonstrate that it is appropriate to subcontract the implementation of such **tie** Change; and

80.8.2 comply with Good Industry Practice with the objective of ensuring that it obtains best value for money when procuring any sub-contractor or Deliverable required in relation to the proposed **tie** Change.

80.9 As soon as reasonably practicable after **tie** receives the Estimate, the Parties shall discuss and agree the issues set out in the Estimate. From such discussions **tie** may modify the **tie** Notice of Change, In each case the Infraco shall subject to Clause 80.11, as soon as practicable, and in any event not more than 15 Business Days after receipt of such modification, notify **tie** of any consequential changes to the Estimate.

80.10 Subject to Clause 80.15, if the Parties cannot agree on the contents of the Estimate, then either Party may refer the Estimate for determination in accordance with the Dispute Resolution Procedure.

80.11 If a **tie** Change requires a change in respect of design work to be carried out by the SDS Provider under the SDS Contract or any other change to the SDS Contract, the cost of such change will be valued in accordance with the terms of the SDS Contract and Infraco shall be allowed such time to perform its obligations under this Clause 80 as may reasonably be

required to allow it to obtain information from the SDS Provider under the SDS Contract which Infraco may require in order to prepare an Estimate for such Change and any modifications thereto.

80.12 The Infraco shall not be obliged to implement any proposed **tie** Change where:

80.12.1 **tie** does not have the legal power or capacity to require the implementation of such proposed **tie** Change; or

80.12.2 NOT USED

80.12.3 implementation of such proposed **tie** Change would:

80.12.3.1 be contrary to Law;

80.12.3.2 not be technically feasible;

80.12.3.3 increase the risk of a non-compliance with this Agreement by the Infraco to the extent such risk is not capable of being addressed by relief from obligations given to the Infraco or by amendment to the terms of this Agreement;

80.12.3.4 be outwith the specific competence of the Infraco either in performing the activity required by the **tie** Change or in supervising an the Infraco Party to carry out the activity required by the **tie** Change;

80.12.3.5 where the **tie** Change is instructed after the completion of Section D, require Infraco to carry out work and/or services that are not transport infrastructure and maintenance related to be performed after completion of Section D; or

80.12.3.6 make the provision of the Maintenance Services by the Infraco financially unfeasible.

80.13 Subject to Clause 80.15, as soon as reasonably practicable after the contents of the Estimate have been agreed **tie** may:

80.13.1 issue a **tie** Change Order to Infraco,; or

80.13.2 except where the Estimate relates to a Mandatory **tie** Change, withdraw the **tie** Notice of Change, in which case Infraco shall be entitled to claim the reasonable additional

costs incurred by the Infraco in complying with this Clause 80 in relation to that **tie** Notice of Change including the cost of any abortive works where **tie** has instructed Infraco to commence works prior to the agreement of the Estimate.

Subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a **tie** Change until instructed through receipt of a **tie** Change Order unless otherwise directed by **tie**.

80.14 Subject to Clause 80.15, if **tie** does not issue a **tie** Change Order in accordance with Clause 80.13.1, within 28 Business Days of the contents of the Estimate having been agreed or determined then the **tie** Notice of Change shall be deemed to have been withdrawn except where the Estimate relates to a Mandatory **tie** Change in which case **tie** will be deemed to have issued a **tie** Change Order.

80.15 Where an Estimate has been referred to the Dispute Resolution Procedure for determination, but it is deemed by **tie** (acting reasonably) that the proposed **tie** Change is urgent and/or has a potential significant impact on the Programme, subject to Infraco's right to refuse to carry out a **tie** Change under Clause 80.12 and save where such proposed **tie** Change includes work by the SDS Provider and where the valuation of such work is not agreed, **tie** may instruct Infraco to carry out the proposed **tie** Change prior to the determination or agreement of the Estimate by issuing a **tie** Change Order to that effect.

80.16 Where **tie** issues a **tie** Change Order under Clause 80.15, Infraco shall implement the **tie** Change, and prior to determination of the Estimate shall be entitled to claim Infraco's demonstrable costs in implementing the **tie** Change calculated in accordance with Clause 80.6.

80.17 As soon as reasonably practicable and in any event within 20 Business Days of issue of a **tie** Change Order, or such other period as the Parties may agree acting reasonably, Infraco shall update:-

80.17.1 the Programme in accordance with Clause 60;

80.17.2 Schedule Part 5 (*Milestone Payments*) in relation to Milestone Payments and/or Critical Milestone Payments in accordance with Clause 67.10;

80.17.3 the Maintenance Services Payments in accordance with Clause 68.8;

80.17.4 the Maintenance Services Performance Plan; and

80.17.5 any other previously accepted Deliverable

as may be required in accordance with the agreed Estimate or as may be required to implement the **tie** Change in accordance with this Agreement.

80.18 As soon as reasonably practicable and in any event within 20 Business Days of issue of a **tie** Change Order, or such other period as the Parties may agree acting reasonably, the Parties shall enter into any document to amend the terms and conditions of this Agreement as referred to in the agreed Estimate to which the **tie** Change Order relates.

Restrictions on Entitlements to Relief for tie Change

80.19 The Infraco shall not be entitled to any extension of time, payment or relief in respect of any **tie** Notice of Change affecting the construction of the Infraco Works or the delivery of the Maintenance Services if and to the extent that:

80.19.1 with regard to construction, it would be reasonable to expect Infraco to have prevented or materially reduced the requirement for such **tie** Change, given the information known to Infraco at the time; and

80.19.2 with regard to Infrastructure Maintenance Services, it would have been reasonable to expect the Infraco to have foreseen that a physical deficiency or defect in the Infraco Works would, despite continual planned maintenance, lead to the requirement for a **tie** Change which could have been prevented or materially reduced by earlier intervention by **tie** and Infraco has failed to report such deficiency or defect in the Infraco Works in a timely fashion to **tie**.

80.20 If, having received instructions from **tie** or **tie's** Representative, the Infraco consider that compliance with those instructions would amount to a **tie** Change, then the Infraco shall comply with the instruction and shall within 20 Business Days of any instructions being received, notify **tie** of the same, such notification to include an Estimate pursuant to Clauses 80.4 and 80.5. From the date of receipt by **tie** of such an Estimate, Clause 80.15 and 80.16 shall be deemed to apply *mutatis mutandis* to the work carried out by Infraco in complying with such instruction. If it is agreed by the Parties or determined pursuant to the Dispute Resolution Procedure that the instructions amount to a **tie** Change (either Party being entitled to refer the matter to the Dispute Resolution Procedure if the matter has not been agreed within 10 Business Days of the Estimate being received by **tie**) then the provisions of this Clause 80 (*tie* Changes) shall apply to such instructions.

80.21 Any failure by the Infraco to notify **tie** within 20 Business Days of instructions being received that it considers compliance with such instructions from **tie** or **tie's** Representative would

amount to a **tie** Change shall constitute an irrevocable acceptance by the Infraco that any compliance with **tie's** or **tie's** Representative's instructions shall not constitute a **tie** Change under this Agreement.

Third Party Agreements

80.22 If **tie** wishes Infraco to perform any of the obligations contained in any third party agreement which are not set out in part A of Schedule Part 13 (*Third Party Agreements*) or to be responsible for ensuring that neither **tie** or CEC will be put in breach of their obligations to third parties other than to the extent that it is responsible by virtue of the operation of Clause 18.17A **tie** shall serve a notice on the Infraco (a "**TPA Change Notice**") which notice shall comply with the requirements of Clause 80.2. Subject to Clause 80.25, the provisions of this Clause 80 shall apply *mutatis mutandis* to any TPA Change Notice served by **tie**.

80.23 Following service by **tie** of a TPA Change Notice, the Parties shall negotiate in good faith and acting reasonably to agree the adjustment to the Contract Price, if any, appropriate to compensate Infraco for the Infraco accepting any additional responsibility or risk arising from the TPA Change Notice to the extent not reflected adequately through application of Clause 80.5.

Notified Departures

80.24 Where pursuant to paragraph 3.5 of Schedule Part 4 (*Pricing*) or pursuant to Clause 14 (*tie Obligations*), **tie** is deemed to have issued a **tie** Notice of Change as a result of the occurrence of a Notified Departure, the provisions of this Clause 80 (*tie Changes*) other than Clause 80.19 shall apply.

81. INFRACO CHANGES

81.1 If the Infraco becomes aware of the need or desirability for a variation to the Infraco Works, (which does not fall within any of the other categories listed in Clause 79.1, save for Clause 79.1.2) the Infraco shall notify **tie** of the reasons for such variation and make proposals for the proposed variation in writing. **tie** shall be free to accept or reject any proposed variation as **tie** thinks fit, (other than where the Infraco Change is necessary for Infraco to comply with a Change in Law which is not a Qualifying Change in Law, in which case **tie** shall accept such proposal or such other proposal as **tie** may reasonable require which does not increase the costs to the Infraco of complying with the relevant Change in Law) and **tie** shall determine whether such proposal is dealt with in accordance with Clause 81.2 or Clause 81.3.

81.2 If **tie** wishes to proceed with a variation proposed by the Infraco, **tie** shall serve a **tie** Notice of Change on the Infraco and Clause 80 shall be adhered to by **tie** and the Infraco in respect thereof, provided that:

81.2.1 **tie** may require that there be a reduction to the Contract Price if such change will result in lower costs for the Infraco; or

81.2.2 in the event of an anticipated increase to the costs of the Infraco resulting from any change requested by the Infraco pursuant to Clause 81.1, there shall be no variation to the Contract Price unless otherwise agreed by the Parties.

81.3 If Infraco considers that a change could effect a saving of £20,000 (as Indexed) or more, the Infraco shall propose such change in accordance with Clause 81.1 and the Infraco's proposal shall be accompanied by a value engineering report which shall include:

81.3.1 a whole life cost analysis in respect of each element of (i) the Infraco Works affected by the proposed change and/or (ii) any additional works proposed to be carried out in order to effect the proposed change;

81.3.2 option appraisals and reasoned arguments to demonstrate why any particular systems, plant, equipment, materials and the like should be selected in preference to others for incorporation into the Infraco Works, taking into account the operational life of the Edinburgh Tram Network; or

81.3.3 the Infraco's proposals for the lump sum reduction to the Contract Price in respect of such proposal.

tie may accept such proposal at its absolute discretion and its decision in this respect shall be final and binding. If the proposed change is accepted, the reduction to the Contract Price that is anticipated as arising as a result of such change shall be shared between **tie** and the Infraco on a 50:50 basis and the Infraco's share shall be added to the Contract Price after the saving has been made.

81.4 As soon as reasonably practicable and in any event within 20 Business Days of issue of acceptance by **tie** of an Infraco Change or such other period as the Parties may agree acting reasonably, Infraco shall update:-

81.4.1 the Programme in accordance with Clause 60;

81.4.2 the Maintenance Services Performance Plan; and

81.4.3 any other previously accepted Deliverable

as may be required in accordance with the agreed Infraco Change or as may be required to implement the Infraco Change in accordance with this Agreement.

82. SMALL WORKS CHANGES

82.1 In the event that **tie** or **tie's** Representative, by notice in writing to the Infraco, requests the Infraco to carry out any Small Works, the Infraco shall calculate the cost of them as follows:

82.1.1 the labour element shall be calculated in accordance with Schedule Part 4 (*Pricing*) or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Small Works requested;

82.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco (net of all discounts) plus the percentage uplift as indicated in Schedule Part 4 (*Pricing*); and

82.1.3 the plant element shall be calculated in accordance with Schedule Part 4 (*Pricing*) or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Small Works requested; and

82.1.4 the Sub-Contractor element shall be charged at the cost (excluding VAT) plus the percentage uplift as indicated in the Schedule Part 4 (*Pricing*)

and as soon as reasonably practicable and no later than 5 Business Days, the Infraco shall confirm by notice in writing to **tie** (the "**Small Works Cost Notice**") the amount of such cost and the basis for, and inputs to, such calculation.

82.2 **tie** shall not request the Infraco to carry out any Small Works, the execution of which would require input from the SDS Provider, the Tram Supplier or the Tram Maintainer.

82.3 The Infraco and **tie** or **tie's** Representative shall agree the timing of any Small Works so as to minimise any inconvenience to **tie**, the Infraco or disruption to the Programme. The Infraco shall take all reasonable steps to minimise the duration of any Small Works.

82.4 If, at any time within 5 Business Days following receipt by **tie** of a Small Works Cost Notice pursuant to Clause 82.1, **tie** notifies the Infraco in writing that **tie** or **tie's** Representative wishes the Infraco to proceed with the Small Works to which the Small Works Cost Notice relates, the Infraco shall carry out and complete such Small Works in accordance with the said Small Works Cost Notice and the relevant request pursuant to Clause 82.1 from **tie** in

accordance with any timing agreed pursuant to Clause 82.3 but otherwise as soon as reasonably practicable.

82.5 Infraco shall not be obliged to implement a Small Works Change in the circumstances where Clause 80.12 would have applied had the Small Works Change been a **tie** Change.

82.6 As soon as reasonably practicable and in any event within 20 Business Days of issue of a Small Works Change, or such other period as the Parties may agree acting reasonably, Infraco shall update:

82.6.1 the Programme in accordance with Clause 60;

82.6.2 Schedule Part 4 (*Pricing*) in relation to Milestone Payments and/or Critical Milestone Payments in accordance with Clause 67.10;

82.6.3 the Maintenance Services Payment in accordance with Clause 68.8;

82.6.4 the Maintenance Services Performance Plan; and

82.6.5 any other previously accepted Deliverable

to take account of the Small Works Change and implement it in accordance with this Agreement.

83. ACCOMMODATION WORK CHANGES

83.1 In the event that **tie** or **tie's** Representative, by notice in writing to the Infraco, requests the Infraco to carry out any Accommodation Works, the Infraco shall calculate the cost of them as follows:

83.1.1 the labour element shall be calculated in accordance with Schedule Part 4 (*Pricing*) or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Accommodation Works requested;

83.1.2 the materials element shall be charged at the cost (excluding VAT) of the materials to the Infraco plus the percentage uplift as indicated in Schedule Part 4 (*Pricing*); and

83.1.3 the plant shall be calculated in accordance with the Schedule Part 4 (*Pricing*) or, where such rates are not applicable, in accordance with the rates which are fair and reasonable having regard to the nature of the Accommodation Works requested; and