



(1) tie LIMITED

- and -

(2) BILFINGER BERGER (UK) LIMITED

- and -

(3) SIEMENS plc

INFRACO CONTRACT

**RELATING TO THE
EDINBURGH TRAM NETWORK**

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AGREEMENT

BETWEEN

- (1) **tie LIMITED** a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh EH1 1YJ ("**tie**") which expression shall include its successors, permitted assignees and transferees; and
- (2) **BILFINGER BERGER UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 150 Aldersgate Street, London EC1A 4EJ which expression shall include its successors, permitted assignees and transferees; and
- (3) **SIEMENS PLC**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey GU16 8QD which expression shall include its successors, permitted assignees and transferees,

and (2) and (3) shall together be "**the Infraco**" and each separately an "**Infraco Member**".

WHEREAS

- A. Powers in respect of the design, construction, commissioning and operation of the Edinburgh Tram Network were conferred on CEC by the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 which received Royal Assent on 8 May 2006 and 27 April 2006 respectively.
- B. Pursuant to a notice published in the Official Journal of the European Union on 31 January 2006 with reference 2006/S 20-021872, **tie** invited expressions of interest from appropriately qualified parties to carry out and/or manage the design, construction, installation, commissioning, tram procurement, system integration, infrastructure maintenance, tram maintenance and supply of related equipment and materials, trams and related infrastructure in respect of the Edinburgh Tram Network.
- C. By a competitive tendering process conducted in accordance with Law, **tie** has selected the Infraco to carry out the Infraco Works.
- D. Under separate agreements, **tie** has appointed the SDS Provider to provide system design services under the terms of the SDS Agreement, the Tram Supplier to supply trams, capital spares and special tools under the terms of the Tram Supply Agreement, and the Tram

Maintainer to provide tram maintenance services and supply consumable spares under the terms of the Tram Maintenance Agreement.

- E. **tie**, the Infraco, the SDS Provider, the Tram Supplier and the Tram Maintainer have respectively agreed to the novation of each of the SDS Agreement, the Tram Supply Agreement and the Tram Maintenance Agreement to the Infraco.
- F. It is acknowledged that this Agreement aims to achieve a project vision (the "**Project Vision**") for the Edinburgh Tram Network. This Project Vision involves the development of a tramway which will stand favourable comparison with the best in Europe. The quality of the tramway provided will be appropriate to Edinburgh's status and role as a European capital city and its city centre's designation as a World Heritage Site. The tramway will integrate as far as possible with other transport modes to serve the existing fabric of the City of Edinburgh, and promote appropriate development and social inclusion. It is intended that this goal be achieved in a spirit of partnership, utilising modern design and construction methods and standards.

NOW IT IS AGREED AS FOLLOWS

PART 1 - PRELIMINARY MATTERS

1. DEFINITIONS AND INTERPRETATION

- 1.1 Schedule Part 1 (*Definitions and Interpretation*) shall govern all matters concerning definitions and interpretation.

2. TERM OF THE AGREEMENT

- 2.1 Subject to Clause 3 (*Conditions Precedent*), this Agreement shall come into effect on the Effective Date and subject to Clauses 2.2, 2.3 and 2.4 shall continue in effect until the earlier of:

2.1.1 the Expiry Date; and

2.1.2 the Termination Date.

- 2.2 Not less than 180 days prior to the Expiry Date, **tie** shall be entitled to serve a notice extending the duration of this Agreement for 5 years so that the Agreement continues in effect until the earlier of:

2.2.1 the Extended Expiry Date; and

- 2.2.2 the Termination Date.
- 2.3 If **tie** serves a notice pursuant to Clause 2.2:
- 2.3.1 the Agreement shall continue on the same terms as are in effect at the date of serving of such notice; and
- 2.3.2 the value of the extension shall be determined in accordance with Clause 80 (**tie Changes**) and such extension will be a Mandatory **tie** Change.
- 2.4 Not less than 180 days prior to the Extended Expiry Date, **tie** shall be entitled to serve a notice proposing an extension of the Term. If **tie** serves such a notice under this Clause 2.4:
- 2.4.1 **tie** and the Infraco shall negotiate in good faith to agree the terms of any amendment to this Agreement which will apply with effect from the day after the Extended Expiry Date for the duration of the period of such extension; and
- 2.4.2 the valuation of any extension shall be determined in accordance with Clause 80 (**tie Changes**); and
- 2.4.3 if **tie** and the Infraco agree the matters referred to in Clause 2.4.1 prior to the date when this Agreement would otherwise have expired, the Extended Expiry Date shall be extended to such date as may be agreed between **tie** and the Infraco, and with effect from the day after the Extended Expiry Date (being the date that would have occurred but for such extension), the Infraco shall perform its obligations under the terms of this Agreement as amended pursuant to this Clause 2.4.
- 2.5 **tie** may serve further notices proposing extensions to the duration of this Agreement up to a maximum total duration of 30 years and the provisions of Clause 2.4 shall apply *mutatis mutandis* to such further notices and any subsequently agreed extension.

3. **CONDITIONS PRECEDENT**

- 3.1 Except for the provisions of this Part 1 (*Preliminary Matters*), Clause 11 (*Novation of the SDS Agreement to the Infraco*), Clause 12 (*Novation of the Tram Supply Agreement to the Infraco*), Clause 13 (*Novation of the Tram Maintenance Agreement to the Infraco*), Clause 74 (*Bond, Parent Company Company Guarantees and Collateral Warranties*), Clause 76 (*Required Insurances*), Clause 77 (*Indemnity By Infraco, Liability and Sole Remedy*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*), Clause 106 (*Entire Agreement*), Clause 108 (*Variations to be in*

Writing), Clause 110 (*No Partnership or Agency*), Clause 111 (*Notice*), Clause 112 (*Invalid Terms*), Clause 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*), the obligations of the Parties under this Agreement shall be suspensively conditional upon the occurrence of the Commencement Date.

- 3.2 **tie** may by notice in writing to the Infraco waive any or all of the Conditions Precedent.
- 3.3 On the date that all of the Conditions Precedent (with the exception of any Conditions Precedent that have been expressly waived by **tie** in writing) have, in **tie's** opinion (acting reasonably) been satisfied, **tie** shall issue the CP Certificate.
- 3.4 The Infraco shall use its reasonable endeavours to satisfy or procure the satisfaction of the Conditions Precedent as soon as reasonably possible after the Effective Date.
- 3.5 In the event that the Commencement Date has not occurred by the date falling 3 months after the Effective Date (or such later date as may be agreed in writing between the Parties), **tie** may terminate this Agreement with immediate effect following the service of a notice to that effect on the the Infraco, and in which event, all provisions of this Agreement (other than Part 1 (*Preliminary Matters*), Clause 77 (*Indemnity By Infraco, Liability and Sole Remedy*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*), Clause 106 (*Entire Agreement*), 108 (*Variations to be in Writing*), 110 (*No Partnership or Agency*), 111 (*Notices*), 112 (*Invalid Terms*), 113 (*Third Parties Rights*) and Clause 117 (*Applicable Law*)), shall cease to have effect and such termination shall be without prejudice to any accrued rights or obligations as at that date.

4. PRIORITY OF CONTRACT DOCUMENTS

- 4.1 NOT USED
- 4.2 In the event of any ambiguity or discrepancy between any provisions in the main body of this Agreement and those in any Part of the Schedule, or between the provisions of any Schedules, **tie's** Representative shall state in writing which provision shall take priority, which shall be deemed to be instructions issued pursuant to Clause 34.1. Provided always that, unless expressly stated otherwise by **tie's** Representative the main body of the Agreement shall always take priority and the following order of priority will apply to Schedule Part 2 (*Employer's Requirements*) and Schedule Part 30 (*Infraco's Proposals*):
- 4.2.1 the Employer's Requirements; over
- 4.2.2 the Infraco's Proposals.

- 4.2A Notwithstanding Clause 4.2, if there is any ambiguity or discrepancy between the requirements set out in Schedule Part 44 (*EAL Works*) which the Infraco must comply with whilst carrying out works on the EAL Site and any provision of this Agreement the requirements set out in Schedule Part 44 (*EAL Works*) shall take precedence.
- 4.3 Nothing in this Agreement shall prejudice the Infraco's right to claim additional relief or payment pursuant to Schedule Part 4 (*Pricing*).
- 4.4 The Infraco confirms that it has studied in detail the Employer's Requirements and each document comprised therein and has satisfied itself that no discrepancies or errors exist within the Employer's Requirements or between it and the Infraco's Proposals. The Infraco acknowledges that it accepts all risks arising from any discrepancies, errors or omissions that subsequently appear within or between such documents and that, subject to Clause 4.2, 4.3 and 4.5, it shall not be entitled to make any claim against **tie** for an extension of time, additional payment, any relief or otherwise in respect of any such errors, discrepancies or omissions. The Infraco will notify **tie** forthwith upon becoming aware of a discrepancy or error within the Employer's Requirements or between the Employer's Requirements and the Infraco's Proposals. Where there is such discrepancy or error which cannot be resolved by the provisions of the Employer's Requirements, the Infraco shall as soon as reasonably practicable, and in any event within 5 Business Days, provide **tie** with proposals for resolving such discrepancy or error which comply with this Agreement.
- 4.5 Unless, within 10 Business Days of receipt by **tie** of the Infraco's proposals for resolving such discrepancy or error, **tie** notifies the Infraco requiring it to resolve the discrepancy in a different manner (which manner shall be binding but shall be reasonable in time and cost having regard to the Employer's Requirements and which shall be deemed to be instructions in accordance with Clause 34.1), the Infraco shall resolve the discrepancy in the manner proposed by it.
- 4.6 Subject to Clause 4.4, the Infraco shall review all documents, drawings or other subsequent information produced to amplify this Agreement and/or issued by **tie**, within 10 Business Days or such other period as is agreed by **tie** acting reasonably of the date of receipt of such documents, drawings or other subsequent information, and shall bring to the attention of **tie's** Representative any ambiguities or discrepancies, or requirements for further information arising from them. Save as otherwise stipulated in this Agreement and without prejudice to Infraco's express rights or remedies under this Agreement, failure to comply with this obligation shall prevent the Infraco from being entitled to an extension of time, additional payment, any relief or otherwise in respect of problems which would have been notified or

requests which would have been made had this obligation been complied with. Without prejudice to **tie's** express rights and remedies under this Agreement in relation to the consequences of the Infraco's failure to comply with this Clause 4.6, **tie** shall not be entitled to any remedy for breach of contract in respect of the Infraco's failure to comply with this Clause 4.6.

4.7 Clause 4.6 shall not apply to documents, drawings or other information to be considered under Schedule Part 14 (*Design Review and Design Management Plan*).

5. PROVISION AND INTERPRETATION OF INFORMATION

5.1 Subject to Clause 22 (*Adverse Physical Conditions and Artificial Obstructions*), Clause 64 (*Relief Events*) and Clause 65 (*Compensation Events*), the Infraco shall be deemed to have inspected and examined the Site and its surroundings and to have satisfied itself before the Effective Date as to:

5.1.1 the ground conditions on the Site including the climatic, geotechnical, ecological, environmental, hydrological, sub-soil and sub-surface conditions;

5.1.2 all relevant safety requirements and environmental matters;

5.1.3 the form and nature of the Site;

5.1.4 the nature of the materials (whether natural or otherwise) to be excavated;

5.1.5 the extent and nature and difficulty of the work and materials necessary for the completion of the Infraco Works;

5.1.6 the quality of any existing structures which will form part of or be associated with or will be adjacent to the Edinburgh Tram Network;

5.1.7 the risk of injury or damage to property adjacent to the Site and to occupiers of such property;

5.1.8 the possibility of interference by parties other than **tie**;

5.1.9 the precautions and the times and methods of working necessary to comply with Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*) and, in accordance with Good Industry Practice, minimise any nuisance or interference, whether public or private, being caused to any third parties;

5.1.10 use by third parties of any of the land which will form part of or will be adjacent to the Edinburgh Tram Network;

5.1.10.1 the means of communication with and restrictions of access to the Site;

5.1.10.2 the accommodation the Infraco may require; and

5.1.10.3 in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances influencing or affecting the Infraco Works.

The Infraco shall to the extent necessary for the carrying out of the Infraco Works take due and proper account of the above risks associated with carrying out the Infraco Works and, save where provided otherwise in this Agreement, the Infraco shall not be entitled to any extension of time, relief or to any additional payment on grounds of any misunderstanding or misinterpretation of any such matter, nor shall the Infraco be released from any of the risks accepted or obligations undertaken by the Infraco under this Agreement on the ground that the Infraco did not or could not have foreseen any matter which might affect or have affected the execution of the Infraco Works.

PART 2 - GENERAL OBLIGATIONS

6. PROJECT PARTNERING

6.1 The Parties agree to work in mutual co-operation to fulfil their agreed roles and responsibilities and apply their expertise to carry out and complete the Infraco Works in accordance with this Agreement.

6.2 **tie** and the Infraco shall procure that each **tie** Party and each Infraco Party (as appropriate) shall work in accordance with the principles set out in Clause 6.1.

6.3 Subject to Clause 6.4, each Party ("**First Party**") undertakes to co-operate with the other ("**Second Party**") in order to facilitate the performance of this Agreement and in particular the First Party shall:

6.3.1 approach all Permitted Variations on a collaborative and Open Book Basis;

6.3.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;

- 6.3.3 comply with the provisions of the Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the Second Party;
 - 6.3.4 not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;
 - 6.3.5 take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 6.3.2 to 6.3.4 (inclusive); and
 - 6.3.6 take all reasonable steps to manage, minimise and mitigate all costs.
- 6.4 Nothing in Clause 6.3 shall:
- 6.4.1 interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit (in compliance with Law) in order to exercise its rights and perform its obligations under this Agreement (in compliance with Law) and, in the case of **tie**, its duties and functions as a wholly owned subsidiary of CEC; or
 - 6.4.2 relieve either Party from any obligation contained in this Agreement or from any obligation to pay any debt due and payable under this Agreement.
- 6.5 Senior representatives from the Parties shall meet on a quarterly basis (or as may be otherwise agreed by the Parties) to review:
- 6.5.1 any matter which has adversely affected or may adversely affect:
 - (a) the completion of the Infraco Works;
 - (b) the performance and presentation of the Edinburgh Tram Network;
 - (c) the functioning of the City of Edinburgh (including other modes of transport) and the people of Edinburgh, because of the carrying out of the Infraco Works; and/or
 - (d) the Infraco's ability to perform its obligations in terms of the Agreement;
 - 6.5.2 any proposal from either Party to:
 - (a) minimise costs; and/or

(b) optimise the performance and quality of the Edinburgh Tram Network.

- 6.6 Either Party may propose measures to address the matters set out in Clause 6.5.1 and a determination of what measures (if any) should be undertaken by the Infraco and/or **tie** to address such matters shall be considered in accordance with and subject to each Party's existing rights, obligations and the existing contractual mechanisms under this Agreement including but not restricted to the rights, obligations and contractual mechanisms set out in Clause 64 (*Relief Events*), Clause 65 (*Compensation Events*), Clause 80 (**tie Changes**), Clause 81 (*Infraco Changes*), Clause 82 (*Small Works Changes*), Clause 83 (*Accommodation Works Changes*) and Clause 84 (*Qualifying Changes in Law*).
- 6.7 Any proposal from either Party in terms of Clause 6.5.2 shall be reviewed in accordance with Clause 80 (**tie Changes**), Clause 81 (*Infraco Changes*) or Clause 82 (*Small Works Changes*) (as appropriate).
- 6.8 As required by **tie**, the Infraco shall procure the attendance of any of the Infraco Parties at the meetings described in Clause 6.5. The Infraco shall provide **tie** with reasonable notice of any regular progress meetings regarding performance of the Tram Supply Agreement and the Tram Maintenance Agreement and **tie** shall be entitled to attend such meetings where **tie** or **tie's** Representative have a right to attend such meetings (the Infraco using reasonable endeavours to secure such attendance) pursuant to the Tram Supply Agreement and the Tram Maintenance Agreement and, if **tie** reasonably requires to attend any other meeting, the Infraco shall use reasonable endeavours to facilitate such attendance.
- 6.9 The Infraco shall notify **tie** in writing no less than five Business Days prior to making any demand on any of the performance or reliability bonds held by the Infraco from sureties in respect of the performance of the Tram Supplier and Tram Maintainer.

7. DUTY OF CARE AND GENERAL OBLIGATIONS IN RELATION TO THE INFRACO WORKS

- 7.1 **tie** hereby appoints the Infraco in accordance with the terms of this Agreement and the Infraco hereby accepts full responsibility and agrees to carry out and complete the Infraco Works fully and faithfully in accordance with this Agreement.
- 7.2 Notwithstanding the specific responsibilities set out in Clause 7.3, the Infraco undertakes to **tie** that in carrying out and completing the Infraco Works it has exercised and undertakes to continue to exercise a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a

similar scope and complexity. The Infraco acknowledges that **tie** will rely upon the skill, care and diligence of the Infraco in connection with all matters for which the Infraco is responsible under this Agreement.

7.3 The Infraco shall (each as distinct and separate obligations), and shall procure that the Infraco Parties, carry out and complete the Infraco Works:

7.3.1 in accordance with and so as to comply in all respects with this Agreement;

7.3.2 so as to enable the Edinburgh Tram Network to be designed, constructed, installed, tested and commissioned, and thereafter operated and maintained;

7.3.3 in accordance with the Infraco's quality management system and plans as developed in accordance with Clause 105 (*Health and Safety, Quality Assurance and Environmental Management System*);

7.3.4 so as to ensure compliance with the Employer's Requirements;

7.3.5 so as to ensure compliance with the Infraco's Proposals;

7.3.6 in accordance with **tie** and CEC Policies;

7.3.7 in accordance with the Code of Construction Practice,

7.3.7.1 in each Section insofar as construction, renewals and/or commissioning activities are taking place in that Section; and

7.3.7.2 in other areas where construction, renewals or commissioning activities whether relative to any Network Expansion, Permitted Variation or otherwise, are being carried out;

7.3.8 in accordance with the Code of Maintenance Practice in the undertaking of the Maintenance Services,

7.3.8.1 in each Section insofar as a Certificate of Sectional Completion has been issued which applies to that Section; and

7.3.8.2 in other areas where construction or commissioning activities whether relative to any Network Expansion, Permitted Variation or otherwise, have been completed;

7.3.9 so as to ensure compliance with the Tram Legislation;

- 7.3.10 so as to ensure compliance with all applicable Law, Land Consents and Consents;
 - 7.3.11 so as to employ all reasonably practicable means to ensure that the environmental impacts are no worse than the residual impacts identified in the Environmental Statements and that such residual impacts are maintained during the Maintenance Services;
 - 7.3.12 in compliance with all applicable environmental regulations and requirements;
 - 7.3.13 in accordance with Good Industry Practice;
 - 7.3.14 so as to ensure that the design of the Edinburgh Tram Network is buildable and maintainable;
 - 7.3.15 so as to assist **tie** in relation to providing information that best value (pursuant to the Local Government (Scotland) Act 1973 as amended by the Local Government in Scotland Act 2003) has been secured in respect of the carrying out of the Infraco Works;
 - 7.3.16 in such manner as not wilfully to detract from the image and reputation of **tie**, Transport Edinburgh Limited, CEC, the Scottish Ministers, Transport Scotland or the Edinburgh Tram Network;
 - 7.3.17 in accordance with the OGC's "Excellence in Construction" initiative;
 - 7.3.18 so as to ensure that sustainability is considered and discussed with **tie** in relation to energy consumption and the supply of materials from sustainable sources for the Edinburgh Tram Network. The Parties acknowledge that the execution of the Infraco Works in compliance with the Infraco Proposals (in relation to sustainability) meet the requirements of this provision;
 - 7.3.19 in a manner that is not likely to be injurious to persons or property excluding any liability for persons or property injuriously affected by the Edinburgh Tram Network in so far as such liability does not arise as the result of either a breach of this Agreement or negligence on the part of the Infraco; and
 - 7.3.20 using the Key Personnel.
- 7.4 The Infraco undertakes and warrants that the Infraco's Proposals shall meet the Employer's Requirements.

- 7.5 The Infraco shall (and shall procure that the Infraco Parties) use reasonable endeavours to ensure that in carrying out the Infraco Works, it:
- 7.5.1 maximises productivity by reference to Good Industry Practice as applicable to construction or maintenance as relevant;
 - 7.5.2 minimises disruption to the city of Edinburgh;
 - 7.5.3 maintains safety, and minimises the potential for accidents, and safeguards the Infraco Works;
 - 7.5.4 safeguards efficiency in the obtaining of Consents; and
 - 7.5.5 minimises costs.
- 7.6 The Infraco shall at all times keep itself fully informed about current professional and technical standards and about all matters relating to, or which might have a bearing on, the carrying out of the Infraco Works.
- 7.7 The Infraco's duties and obligations under or pursuant to this Agreement will not be released, diminished or in any other way affected by any independent inquiry into any matter which may be made or carried out by **tie** or by any firm, company or party on **tie's** behalf nor by any action or omission of any such firm, company or party whether or not such action or omission might give rise to any independent liability of such firm, company or party to **tie**.
- 7.8 The Infraco is deemed to have satisfied itself that it fully understands the scope and extent of the requirements in respect of the Infraco Works, and that it has sufficient information or will at the relevant time have sufficient information, to enable it to carry out the Infraco Works.

Background Information

- 7.9 Subject to the express provisions of this Agreement, the Infraco acknowledges that certain Background Information has been made available to it in relation to this Agreement. Subject to the express provisions of this Agreement, **tie** does not give any warranty or undertaking as to the completeness, currency, accuracy or fitness for any purpose of any of the Background Information and neither **tie**, any **tie** Parties, CEC, TEL nor any of their employees shall be liable to the Infraco in contract, delict (including breach of statutory duty), or otherwise as a result of:
- 7.9.1 any inaccuracy, error, defect, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information; nor

7.9.2 any failure to make available to the Infraco any materials, documents, drawings, plans or other information relating to this Agreement;

provided that nothing in this Clause 7.9 shall exclude any liability in respect of any statements made or information provided fraudulently.

7.10 Subject to the express provisions of this Agreement, the Infraco acknowledges and confirms that it has conducted its own analysis and review of the Background Information and has before the execution of this Agreement, or upon receipt if received thereafter, satisfied itself as to the veracity, accuracy, reasonableness, scope, materiality, currency (where applicable) and completeness of all such Background Information upon which it places reliance.

Liaison

7.11 The Infraco shall (and shall procure that the Infraco Parties) liaise with **tie**, any **tie** Party, the Operator and any other parties as may reasonably be required by **tie** to facilitate the production, by such persons, of any information required from them, in order that the carrying out of the Infraco Works and its other obligations under this Agreement can be progressed according to the Programme. The Infraco shall (and shall procure that the Infraco Parties) liaise with **tie**, any **tie** Party, the Operator, and any other parties as may be reasonably required by **tie** as often as is necessary in order to ensure that the Infraco Works are carried out properly and in accordance with the terms of this Agreement.

7.12 The Infraco shall in relation to any proposed Permitted Variation, collaborate and liaise with **tie** throughout the carrying out of the Infraco Works to ensure due consideration is given to the type of materials and optimum and cost effective construction and maintenance methods, construction and maintenance programmes, and temporary works, as appropriate.

Provision of all Labour, Goods, Materials and Services

7.13 The Infraco shall, subject to the provisions of the Agreement, provide all labour, goods, materials, Infraco's Equipment, Temporary Works, transport to and from and in or about the Site, services and everything whether of a temporary or permanent nature required in and for the execution and completion of the Infraco Works so far as the necessity for providing the same is specified in the Agreement or could be reasonably foreseen therefrom by a contractor experienced in work of a similar nature, scope and complexity as the Infraco Works.

7.14 The Infraco shall take full responsibility for the adequacy, stability and safety of all site operations and methods of construction, installation and maintenance in relation to the Infraco Works.

Prohibited Materials

- 7.15 The Infraco undertakes and warrants to **tie** that it has not specified for use and undertakes that it shall not specify for use and shall ensure that there shall not be used in relation to the Infraco Works, any materials which at the time of specification, installation or commencement of use (as the case may be):
- 7.15.1 are known to be deleterious in the particular circumstances in which they are specified to be used (either to health and safety or to the durability of the Infraco Works); or
 - 7.15.2 contravene any relevant standard or code of practice issued from time to time by the BSI Group or under a European directive relating to standards; or
 - 7.15.3 do not accord with the guidelines contained in the edition of the publication "Good Practice in Selection of Construction Materials" (Ove Arup & Partners) current at the date of specification or commencement of use; or reinstallation; or
 - 7.15.4 contravene Good Industry Practice.
- 7.16 The Infraco undertakes and warrants that on the date of use or installation on the Edinburgh Tram Network, any materials supplied as part of the Infraco Works shall be in accordance with Schedule Part 2 (*Employer's Requirements*).

Investigations and Surveys

- 7.17 The Infraco shall notify **tie** of any ground, physical, or geophysical investigations or archaeological or ecological surveys and other investigations or surveys which it intends to carry out before such investigations or surveys are carried out.

Abortive Works

- 7.18 As soon as reasonably practicable after the Infraco becomes aware that any element of the Infraco Works likely to be Abortive Work for any reason, the Infraco shall notify **tie** of:
- 7.18.1 the probable nature of the Abortive Work;
 - 7.18.2 the cause of the Abortive Work being abortive;
 - 7.18.3 the estimated effect of the Abortive Work in terms of cost, of time in completion of the Infraco Works and of any other matters in relation to the Agreement; and
 - 7.18.4 any measures to be taken which may mitigate that effect.

- 7.19 The Infraco and **tie** shall jointly investigate, and **tie** shall determine the actual extent of any Abortive Work.
- 7.20 Payment by **tie** to the Infraco in respect of any Abortive Work which has been carried out by the Infraco shall be valued in accordance with Clause 80 (*tie Changes*) and shall be paid by **tie** in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) provided always that no payment shall be due for Abortive Work to the extent it has resulted from any fault of the Infraco and/or any breach by the Infraco of its obligations under this Agreement.

Advanced Works Agreement

- 7.21 On the Commencement Date:
- 7.21.1 all work performed by the Infraco under the Mobilisation and Advanced Works Agreement shall be deemed to have been performed under this Agreement and the Mobilisation and Advanced Works Agreement shall terminate; and
- 7.21.2 subject to Clause 7.21.3, any claims which the Parties may have against each other under the Mobilisation and Advanced Works Agreement shall be deemed to be claims available to the Parties under this Agreement; and
- 7.21.3 to the extent that the Infraco has any entitlement to claim any additional time or costs in respect of Compensation Event (a) - (s) and (w) **tie** shall not be obliged in assessing such entitlements under Clause 65 (*Compensation Events*), to take account of any delay or costs to the extent that such delay or costs arose prior to the Commencement Date.
- 7.22 On the Commencement Date, all work performed by the Tram Supplier under the Tram Supply Advanced Works Agreement shall be deemed to have been performed under the Tram Supply Agreement and the Tram Supply Advanced Works Agreement shall terminate.

8. SYSTEM INTEGRATION

- 8.1 The Infraco shall ensure that the following key elements of the system integration of the Infraco Works are implemented:
- 8.1.1 insofar as identified within Schedule Part 2 (*Employers Requirements*), compliance with sub-system performance requirements as defined in Schedule Part 2 (*Employer's Requirements*) and to the extent not so identified in Schedule Part 2 (*Employer's*

Requirements), definition of sub-system performance requirements and demonstration by calculation that when such sub-systems are integrated they shall achieve the System Availability Target set out in Schedule Part 2 (*Employer's Requirements*) including the Operations Performance Specification during completion of construction, installation, re-installation or renewals;

- 8.1.2 management of technical interfaces including system wide issues such as electro-magnetic compatibility and stray current protection, noise, vibration and wheel/rail interface ensuring that each and every material issue arising is satisfactorily closed out following completion of construction, reinstallation or renewals and thereafter maintained as part of the Maintenance Services;
 - 8.1.3 test management including the preparation of method statements, test scripts, the setting of pass/fail criteria, and analysis for commissioning and re-commissioning;
 - 8.1.4 alignment of maintenance procedures with the operations procedures produced by the Operator to ensure they form a whole and safe system of work;
 - 8.1.5 system activation following installation, reinstallation and renewals;
 - 8.1.6 safety assurances and the Case for Safety are achieved at the issue of a Certificate of Sectional Completion and thereafter maintained and updated as required; and
 - 8.1.7 preparation and updating of a requirements traceability matrix which shall have the ability to trace the requirements of the Employer's Requirements through the design process, the testing procedures and the operation of the Edinburgh Tram Network.
- 8.2 The Infraco shall during the carrying out of construction, installation, reinstatement or renewals be fully responsible for ensuring that the Trams and any engineer's works vehicles are fully integrated with the Infraco Works. The Infraco shall thereafter be fully responsible for maintaining that the Trams and any engineering works vehicles are fully integrated with the Edinburgh Tram Network.
- 8.3 The Infraco shall carry out and thereafter maintain all of the system integration activities described in Schedule Part 2 (*Employer's Requirements*) and Schedule Part 30 (*Infraco's Proposals*) the achievement of which is tracked in accordance with Clause 8.1.7.
- 8.4 The Infraco shall liaise with the Operator and **tie** as instructed by **tie** in relation to:
- 8.4.1 system operation and related design issues;

8.4.2 the Systems Acceptance Tests; and

8.4.3 operational defects.

8.5 The Infraco shall be responsible for ensuring that all elements of the design (which form part of the Infraco Works) relative to the Edinburgh Tram Network are compatible with system integration and the Infraco shall make qualified personnel available to ensure system integration throughout the Term.

8.6 As part of the Infraco Works, the Infraco shall be responsible for managing the configuration control of the Edinburgh Tram Network, specifically, but not exclusively controlling the introduction of software changes and hardware modifications through version control.

8.7 The Infraco shall procure in particular that the Tram Supplier and the Tram Maintainer comply with their obligations under the Tram Supply Agreement and the Tram Maintenance Agreement as set out in of the Schedule Part 39 (*Tram Supply Agreement and Tram Maintenance Agreement Obligations*) and shall notify **tie** of any breach of such obligations by the Tram Supplier or Tram Maintainer as soon as practicable after the Infraco becomes aware of any such breach.

9. TITLE

General Provisions

9.1 Subject to Clauses 9.6 and 9.7, the Infraco shall transfer or ensure that it procures the transfer of title to CEC in all materials, goods, and equipment intended to form part of the completed Edinburgh Tram Network and all Parts (including Spare Parts and Special Tools but excluding such spare parts owned by Infraco and brought on to the Site for the purposes of this Agreement) supplied or provided by the Infraco pursuant to this Agreement, as the case may be, on the later of:

9.1.1 payment (less any retention applicable) by **tie** to the Infraco of the price for such materials, goods, equipment and Parts (including Spare Parts and Special Tools) in accordance with this Agreement, and

9.1.2 delivery of such item to the Depot or such other part of the Site where the Infraco Works are being carried out;

and such title shall vest in CEC free and clear of all Security Interests and other third party rights of any nature. Subject to Clause 90 (Termination on Infraco Default), **tie** shall, and

shall procure that CEC shall, not take any action which would interfere with Infraco and the Infraco Parties use in the performance of the Infraco's obligations under this Agreement of the materials, goods, equipment and Parts in which title has passed to **tie** or CEC. If required, the Infraco shall at its own expense take all such steps and execute, and procure the execution of, all such instruments as **tie** may reasonably require to ensure that title so passes to CEC according to Law.

9.1.3 For the avoidance of doubt, an Insolvency Event in respect of one Infraco Member shall not absolve the other Infraco Member from its obligations in relation to the delivery of any goods, materials or equipment forming part of or required for the Infraco Works and in respect of which **tie** has made an advance payment to the Infraco, irrespective of how the Infraco Member determined such advance payment should be deployed.

9.2 Any materials, goods, and equipment intended to form part of the completed Edinburgh Tram Network and all Parts (including Spare Parts and Special Tools) in which title has passed to CEC which are at any time removed from the Edinburgh Tram Network will remain the property of CEC and the Infraco undertakes (and shall procure that the Infraco Parties so undertake) to the extent reasonably practicable, to clearly identify such materials, goods, and equipment and all Parts (including Spare Parts and Special Tools) as belonging to CEC and to keep all such Parts stored separately from any third party's property. The location of all such Parts shall be tracked in the Asset Management System at all times. Where, in the Infraco's reasonable opinion, it is necessary to dispose of any such materials, goods, equipment and Parts (including Spare Parts and Special Tools), the Infraco shall notify, and obtain the consent of, **tie** (such consent not to be unreasonably withheld) prior to such disposal. **tie** shall respond within 5 Business Days of receipt of such notification. Where **tie** has not responded within 5 Business Days, the Infraco may effect such disposal.

9.3 The Infraco shall at all times at its own expense label or otherwise clearly identify with a unique traceable coding system as being the property of CEC (and shall procure that Infraco Parties do likewise) any materials, goods, and equipment forming or intended to form part of the completed Edinburgh Tram Network and all Parts (including Spare Parts and Special Tools) in the Infraco's or any Infraco Party's possession or control in relation to which advance payment has been made and/or title has vested in CEC pursuant to this Agreement and the Infraco shall ensure that such items shall at all times in the Infraco's (or any Infraco Party's) possession or control be kept separate from the Infraco's or any third party's goods all to the extent that is agreed practicable by the Parties acting reasonably.

- 9.4 The Infraco shall incorporate provisions equivalent to those provided in Clauses 9.1 to 9.2 (mutatis mutandis) in every sub-contract in order to protect **tie** and CEC's interests in all supplies, materials, goods or equipment intended for the Infraco Works.
- 9.5 **tie** shall, at Infraco's request and where **tie** is satisfied that the Infraco has no equivalent contractual remedy, procure that CEC pursues any claim which CEC may have against the supplier of faulty or defective materials, goods, equipment and Parts in which title has vested in CEC and shall reimburse to Infraco all amounts recovered as a result of such claim subject to Infraco reimbursing the reasonable and proper costs incurred by CEC in pursuing the claim.

Title in the Trams

- 9.6 The Infraco shall procure that each Tram and item of Tram Related Equipment is supplied to **tie** free from all Security Interests, and other third party rights of any nature.
- 9.7 The Infraco shall procure that the Tram Supplier shall, pursuant to the Tram Supply Agreement, transfer title:
- 9.7.1 in each Tram, to CEC, on (i) delivery of that Tram to the Depot (or other designated delivery point in Edinburgh) and on the Certificate of Tram Commissioning being issued in respect of that Tram and in any event within twenty four hours of the successful completion of the Tram Commissioning Tests or (ii) by exception on an individual Tram basis, at the absolute discretion of **tie** and formalised in writing when a Tram is complete and a Factory Acceptance Test Certificate (as defined in the Tram Supply Agreement) has been issued pursuant to the Tram Supply Agreement;
- 9.7.2 to each item of the Tram Related Equipment to CEC, on the later of delivery of each item of the Tram Related Equipment to CEC and the Certificate of Tram Commissioning being issued in respect of the first Tram.

Interoperability and Warranty

- 9.8 The Infraco undertakes that all parts, components, systems, devices, equipment, software and mechanisms incorporated in the Edinburgh Tram Network and the Trams shall be at each Sectional Completion Date and thereafter be maintained so that they are:
- 9.8.1 fit for purpose, compatible and interoperable with each other; and
- 9.8.2 compliant with the Employer's Requirements

For the purposes of this Clause 9.8, "fit for purpose" in relation to any item means that it complies with the Employer's Requirements applicable to that item.

For the avoidance of doubt, this undertaking shall not apply to any items which are to be supplied to Infraco or any Infraco Party by or on behalf of **tie** or any **tie** Party.

9.9 The Infraco shall ensure that:

9.9.1 the relevant parts of the Edinburgh Tram Network (including all fare collection equipment except any Free Issue Fare Collection Equipment) are or will be Euro Compliant before any introduction of the single European currency in the United Kingdom and the Edinburgh Tram Network will not be affected by the introduction of the single European currency in the United Kingdom;

9.9.2 the Infraco's own internal systems and procedures are or will be Euro Compliant before the introduction of the single European currency in the United Kingdom and the Infraco Works will not be affected by the introduction of the single European currency in the United Kingdom; and

9.9.3 the relevant parts of the Edinburgh Tram Network (including all fare collection equipment except any fare collection equipment which is Free Issue Fare Collection Equipment to Infraco or any Infraco Party by or on behalf of **tie** or any **tie** Party) shall at all times throughout the Term be compliant with all Law applicable in relation to the Euro in the United Kingdom, including the rules on conversion, triangulation and rounding set out in EU Regulation Number 1103/97 and any subsequent or similar regulations or Law.

9.10 For the purposes of Clause 9.9 above "**Euro Compliant**" means that (i) the introduction of the Euro within the United Kingdom or any part thereof shall not affect the performance or functionality of any relevant items nor cause such items to malfunction, end abruptly, provide invalid results or adversely affect business, and (ii) all currency reliant and currency related functions (including all calculations concerning financial data) of any relevant items to enable the introduction and operation of the Euro, and (iii) in particular (but without limitation) each and every relevant item shall, to the extent it performs or relies upon currency related functions (including all calculations concerning financial data):

9.10.1 be able to perform all such functions in both the national currency of the United Kingdom and in Euros;

- 9.10.2 during any transition phase applicable to the United Kingdom, be able to deal with the dual denominations of the Euro and national currency of the United Kingdom;
- 9.10.3 recognise, accept, display and print all the Euro currency symbols and alphanumeric codes which may be adopted by any government and other European Union body in relation to the Euro;
- 9.10.4 incorporate protocols for dealing with rounding and currency conversion;
- 9.10.5 recognise data expressed in, and express any output data in, the national currency of the United Kingdom and the Euro; and
- 9.10.6 permit the input of data in Euros and display an outcome in Euros where such data, supporting **tie's** normal business practices, operates in Euros and/or the national currency in the UK.
- 9.11 Any malfunction or non-interoperability of Free Issue Fare Collection Equipment or failure of **tie** or any **tie** Party to provide such Free Issue Fare Collection Equipment in accordance with the Programme shall be a Compensation Event under this Agreement provided that, in the case of malfunction or non-interoperability Infraco has installed the equipment in accordance with the Employer's Requirements and the manufacturer's specifications. For the avoidance of doubt any instruction to remove or replace Free Issue Fare Collection Equipment shall be a **tie** Change provided such malfunction or non-interoperability has not been caused by the Infraco.

Availability of Trams and other goods and materials

- 9.12 Subject to the Tram Supplier transferring title to the Trams to CEC pursuant to the Tram Supply Agreement, and subject to Clause 90 (Termination on Infraco Default) **tie** shall, and shall procure that CEC shall, not take any action which would interfere with Infraco and the Infraco Parties use in the performance of the Infraco's obligations under this Agreement of the Trams and any materials, goods, and equipment in which title has passed to **tie** or CEC pursuant to this Agreement or the Tram Supply Agreement being available to the Infraco and the Infraco Parties for use in the performance of the Infraco's obligations under this Agreement.

10. DEVELOPMENT, REVIEW AND FINALISATION OF THE DELIVERABLES

- 10.1 The Infraco shall develop and finalise the Deliverables in accordance with the Programme and this Agreement, and **tie** shall review the Deliverables and procure that CEC reviews the

Deliverables (which shall include any amendment to any Submitted Item) in accordance with Schedule Part 14 (*Review Procedure and Design Management Plan*).

- 10.2 The Infraco shall submit any Deliverables associated with any Permitted Variations to **tie's** Representative for review pursuant to Schedule Part 14 (*Review Procedure and Design Management Plan*).
- 10.3 The Infraco shall allow **tie's** Representative, at any reasonable time, a reasonable opportunity to view any Deliverable at any stage of development, and this opportunity shall be made available to **tie's** Representative as soon as reasonably practicable following receipt of any written request from **tie's** Representative.
- 10.4 The Infraco shall establish and maintain an extranet which **tie**, any **tie** Parties and any other party reasonably required by **tie** may access remotely by computer (through an appropriate login/security regime) to view any Deliverables including any drawings comprised within the Deliverables and electronically store and/or print copies of such Deliverables.
- 10.5 The Infraco shall ensure that the Programme shall set out (and shall continue to set out) the manner and timing of each phase of the development and production of the Deliverables, the identity (where known) of the party producing the Deliverables, the order in which each Deliverable is to be submitted for review in accordance with the Review Procedure and the programme for uploading the Deliverables onto the extranet in accordance with Clause 10.3. , If at any time, **tie** considers that the Programme will not allow completion of the Infraco Works in accordance with this Agreement, then the Infraco shall make such adjustments as are necessary for that purpose.
- 10.6 The Infraco may, as necessary, update such Programme and shall submit the same from time to time to **tie's** Representative so that **tie** has at least 10 Business Days' notice (or such shorter period as may be agreed between the Parties) of any revision to the periods shown in the previous Programme and the Infraco shall submit to **tie's** Representative five copies of each draft Deliverable in hard copy form and one copy in agreed soft copy form (as appropriate to the format of the deliverable) no later than the end of the period shown in the Programme for that Deliverable.
- 10.7 Where **tie's** Representative does not consider that **tie** will be able to comply with the periods specified in Schedule Part 14 (*Review Procedure and Design Management Plan*) for indicating 'no objection' status or the making of objections in relation to any Deliverable because of the volume of documents to be received in accordance with the Submittal Programme, either the provisions of paragraph 1.4 of Schedule Part 14 (*Review Procedure and*

Design Management Plan) shall apply or **tie** may introduce an alternative timetable and the Infraco shall comply with such alternative timetable. Provided that, where **tie** is unable to comply with the time periods set out in Schedule Part 14 (*Review Procedure and Design Management Plan*) and such inability is not due to any breach of the Programme or this Agreement, omission or fault on the part of the Infraco, the introduction of an alternative timetable shall be a **tie** Change and the terms of Clause 80 (**tie** Changes) shall apply.

10.8 During the preparation of the Deliverables, **tie** and/or **tie's** Representative shall at its absolute discretion be entitled to call for a meeting to discuss the development of any Deliverable, and the Infraco shall give due consideration to any comments made by **tie** or **tie's** Representative at any such meetings. As soon as reasonably practicable following any such meeting, the Infraco will prepare and circulate to those attending the meeting, a report listing the Deliverables discussed and any comments made at such meeting.

10.9 If it should be found that any Deliverable does not fulfil the requirements of this Agreement, or the needs of any Approval Bodies, the Infraco shall amend the Deliverable. Such amendment shall be at the Infraco's cost except where such amendment is required in order for the Deliverable to meet the requirements of any Approval Bodies, where such requirements are:

10.9.1 inconsistent with or in addition to the Infraco Proposals or the Employer's Requirements;

10.9.2 not reasonable given the nature of the Approval Body; or

10.9.3 not reasonably foreseeable within the context of the Infraco's Proposals or the Employer's Requirements,

in which case such amendment shall be a Mandatory **tie** Change. All such amendments shall be made in accordance with Schedule Part 14 (*Review Procedure and Design Management Plan*) and shall ensure that the Deliverable shall satisfy the requirements of this Agreement and any Approval Bodies.

10.10 The Infraco shall provide **tie** with all Deliverables in accordance with the terms of this Agreement and where no timescale for provision of such Deliverables is specified in the Programme, such Deliverables shall be provided to **tie** as soon as reasonably practicable. The Infraco shall provide to **tie**, at no cost to **tie**, five copies of the agreed Deliverables in hard copy form and one copy in an agreed soft copy form (as appropriate to the format of the Deliverables).

- 10.11 In respect of any further copies of a particular Deliverable which **tie** may require, **tie** shall pay the Infraco the reasonable copying charges or other reasonable charges for the provision of the same to **tie**.
- 10.12 Subject to Infraco's express rights under this Agreement, the Infraco accepts all risks arising from any conflicts, ambiguities, discrepancies, errors or omissions that subsequently appear within or between any of the Deliverables, and the Infraco shall not be entitled to make any claim against **tie** for an extension of time, payment or otherwise in respect of any such conflicts, ambiguities, discrepancies, errors or omissions.
- 10.13 The Infraco shall within 12 Business Days notify **tie** upon becoming aware of any conflicts, ambiguities, discrepancies, errors or omissions within or between any of the Deliverables. Where there are any conflicts, ambiguities, discrepancies, errors or omissions, the Infraco shall provide with any such notification, its proposals for resolving such conflicts, ambiguities, discrepancies, errors or omissions in compliance with this Agreement. Such proposals could include the suggestion that no action is required. The Infraco shall proceed with its proposals to resolve any such conflicts, ambiguities, discrepancies, errors or omissions as soon as reasonably practicable. If the proposal from the Infraco is that no action is required or **tie** does not agree with the action proposed by the Infraco, **tie** may notify the Infraco, within 8 Business Days of the Infraco's notice, to resolve any conflicts, ambiguities, discrepancies, errors or omissions in a different manner (which notification shall be binding on the Infraco and shall be deemed to be instructions in accordance with Clause 34.1, but shall be reasonable in time and cost having regard to the Employer's Requirements).
- 10.14 The Infraco shall ensure that all Deliverables comply with the document control requirements specified at paragraph 3.1.2.1 of part A, and paragraph 3.1.2.1 of part B, of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*).
- 10.15 The Infraco shall keep on Site or in the office or offices established pursuant to Clause 10.16 one copy (in paper or electronic format) of all drawings for construction and of all specifications and the same shall at all reasonable times be available for inspection and use by **tie's** Representative and by any other person authorised by it.
- 10.16 The Infraco shall establish at the Site and/or elsewhere an office or offices which shall be staffed during all normal business hours and at which shall be kept a complete, up-to-date and orderly documentary record of the performance of the Infraco Works, all transactions entered into by the Infraco in relation to any potential or actual Permitted Variations and information (including any transactional information) in relation to any claims for additional costs or expenses from the Infraco to **tie** arising in accordance with the terms of this Agreement

(including Compensation Events). To the extent necessary to verify any claim made by the Infraco under this Agreement, **tie**, **tie's** Representative or their duly authorised representatives shall during all normal business hours be permitted to inspect the same and to take copies and to use such copying facilities as are maintained at the place where the records are kept.

- 10.17 The Parties shall adhere to the requirements of the Design Management Plan in terms of timescales, packaging, sequencing and provision of information to support the design approval process.
- 10.18 If the Parties agree to and, following such agreement, **tie** instructs an early release of Issued for Construction Drawings, any subsequent changes required to such Issued for Construction Drawings which arise from the later stages of the Review Procedure shall be instructed as necessary by **tie** and implemented by the Infraco (and the SDS Provider) without a **tie** Change, save where the aggregate costs of any such changes exceeds one million, five hundred thousand pounds (£1,500,000) in which event such change shall be instructed as a Mandatory **tie** Change (provided that there will be no such Mandatory **tie** Change or inclusion of costs in the above cap where the change to the Issued for Construction Drawings is required as a consequence of the SDS Provider or the Infraco being in breach of their obligations in respect of design content or quality pursuant to the SDS Agreement or this Agreement).

PART 3 - NOVATION OF SDS AGREEMENT, TRAM SUPPLY AGREEMENT AND TRAM MAINTENANCE AGREEMENT, AND PROVISION OF TRAM MAINTENANCE SERVICES

11. NOVATION OF THE SDS AGREEMENT TO THE INFRACO

- 11.1 **tie** has entered into the SDS Agreement with the SDS Provider. It is one of the conditions precedent to this Agreement coming into full effect that the Infraco shall enter into and execute a novation agreement with **tie** and the SDS Provider in the form set out in Schedule Part 23 (*SDS Novation Agreement*). **tie** shall execute and shall procure the execution by the SDS Provider of such novation agreement.
- 11.2 On the last date of execution of the novation agreement referred to in Clause 11.1, **tie** and the Infraco shall execute a collateral warranty agreement from the SDS Provider which is in favour of **tie** in the form contained in Schedule Part 24 (*SDS Collateral Warranty in favour of tie*).
- 11.3 The Infraco shall procure that the SDS Provider shall carry out and complete the SDS Services in accordance with the SDS Agreement. To the extent that the SDS Services are and have been carried out and completed in accordance with the SDS Agreement, Infraco will be deemed to

have complied with its obligations under this Agreement to procure that the SDS Provider in its capacity as an Infraco Party complies with the requirements of this Agreement.

- 11.4 The Infraco shall carry out all required management activities in order to manage the performance of the SDS Services and, subject to any express limitations or rights in relation to the performance of the SDS Services in this Agreement, the Infraco shall be wholly liable for the performance of the SDS Services.
- 11.5 The Infraco shall not amend the SDS Agreement (including the SDS Services) without the prior written approval of **tie** (such approval not to be unreasonably withheld or delayed) provided that **tie's** consent shall be deemed to have been given in relation to any amendment to the SDS Agreement (including the SDS Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.
- 11.6 As reasonably required by **tie**, the Infraco shall procure the attendance of the SDS Provider at any meeting in relation to the Infraco Works.
- 11.7 Subject to the provisions of the SDS Agreement, the Infraco shall use reasonable endeavours to procure that the SDS Provider shall perform any additional services which may be required and specifically instructed by **tie** in respect of the Edinburgh Tram Network and the requirement for any additional services shall be a **tie** Change in accordance with Clause 80 (**tie Changes**).
- 11.8 The Infraco shall not terminate in full the appointment of the SDS Provider without the prior written approval of **tie**, such approval not to be unreasonably withheld. If **tie** approves any such termination, a replacement designer shall be proposed by the Infraco in accordance with Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*).
- 11.9 If required by **tie**, on termination or expiry of this Agreement, the Infraco shall novate, assign or otherwise transfer the whole of the SDS Agreement as directed by **tie**, to:
- 11.9.1 **tie**, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than that of **tie**; or
- 11.9.2 to any other person whose obligations under the SDS Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 11.9.1.

In the case of such a novation or assignation, the Infraco shall be entitled, and **tie** shall assist the Infraco, to obtain a collateral warranty from the SDS Provider.

12. NOVATION OF THE TRAM SUPPLY AGREEMENT TO THE INFRACO

- 12A **tie** intends to enter into or has entered into a tram supply agreement with the Tram Supplier. It is one of the conditions precedent to this Agreement coming into full effect that the Infraco shall enter into and execute a novation agreement with **tie** and the Tram Supplier in the form set out in Schedule Part 17 (*Tram Supply Novation Agreement*). **tie** shall execute (if not already executed), and shall procure the execution by the Tram Supplier (if not already executed) of such novation agreement and the Tram Supply Agreement.
- 12.1 On the last date of execution of the novation agreement referred to in Clause 12A, **tie** and the Infraco shall, and the Infraco shall procure that the Tram Supplier shall, execute a collateral warranty agreement in favour of **tie** in the form contained in Schedule Part 18 (*Tram Supply Collateral Warranty in favour of tie*) and the Infraco shall provide the same as executed to **tie** on that date.
- 12.2 The Infraco shall procure that the Tram Supplier shall carry out and complete the Tram Supply Obligations in accordance with the Tram Supply Agreement.
- 12.3 The Infraco shall carry out all required management activities in order to manage the performance of the Tram Supply Obligations subject to any express limitations in this Agreement and the Infraco shall be wholly liable for the performance of the Tram Supply Obligations.
- 12.4 The Infraco shall not amend the Tram Supply Agreement (including the Tram Supply Obligations) without the prior written approval of **tie** (such approval not to be unreasonably withheld or delayed) provided that **tie's** consent shall be deemed to have been given in relation to any amendment to the Tram Supply Agreement (including the Tram Supply Obligations) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.
- 12.5 As reasonably required by **tie**, the Infraco shall procure the attendance of the Tram Supplier at any meeting in relation to the Infraco Works.
- 12.6 Subject to the provisions of the Tram Supply Agreement, the Infraco shall use reasonable endeavours to procure that the Tram Supplier shall supply any additional Trams and/or spare parts and provide any additional services, which are required by **tie** in respect of the Edinburgh Tram Network and the requirement for any additional supply and/or services shall be a **tie** Change in accordance with Clause 80 (*tie Changes*).

- 12.7 Within 5 Business Days of becoming aware that the Tram Supplier's continuing defective performance under the Tram Supply Agreement entitles, or is likely to entitle, the Infraco to serve a termination notice pursuant to the Tram Supply Agreement or entitles or is likely to entitle **tie** to serve a termination notice pursuant to this Agreement, the Infraco shall notify **tie**, such notification to include:
- 12.7.1 a statement that the Infraco has, or is likely to have, an entitlement to serve a termination notice on the Tram Supplier pursuant to the Tram Supply Agreement;
 - 12.7.2 the basis for and an explanation of the circumstances justifying such entitlement to serve the termination notice;
 - 12.7.3 the actions, if any, that the Infraco has been able to take to rectify the Tram Supplier's defective performance;
 - 12.7.4 the Infraco's proposal to deliver the Infraco Works with an alternative Tram Supplier or methodology for procuring an alternative Tram Supplier; and
 - 12.7.5 any obligations Infraco is prevented from or restricted in performing.
- 12.8 **tie** shall review the Infraco's notification and within 5 Business Days **tie** shall respond to the Infraco stating that:
- 12.8.1 it consents to the termination of the Tram Supply Agreement; or
 - 12.8.2 it wishes to agree a comprehensive plan which will have as its objective sustainable rectification (measured against agreed programme and production criteria over a set period) of the Tram Supplier's poor performance (the "**Tram Supply Rectification Plan**").
- 12.9 If **tie** notifies the Infraco of its intention to agree a Tram Supply Rectification Plan in accordance with Clause 12.8 above, the Parties, in such consultation with the Tram Supplier as the Parties may agree, shall negotiate in good faith and use their reasonable endeavours to agree the Tram Supply Rectification Plan, which shall set out:
- 12.9.1 the actions required to be taken by each of **tie**, the Infraco and the Tram Supplier in order to achieve the sustainable rectification (measured against an agreed revised programme and production criteria over a set period) of the Tram Supplier's poor performance;

12.9.2 any specific alternative terms or modifications to the terms of the Tram Supply Agreement;

12.9.3 any specific alternative terms or modifications to the terms of this Agreement;

such that neither Infraco or the Tram Supplier will be in breach of the Tram Supply Agreement or this Agreement if the Tram Supplier performs at that level.

12.10 If the Parties cannot agree the Tram Supply Rectification Plan within 60 Business Days of **tie** notifying the Infraco under Clause 12.9, then the Infraco shall be entitled to serve a termination notice on the Tram Supplier.

12.11 If **tie** notifies Infraco that it consents to the termination of the Tram Supply Agreement the Parties shall meet and agree in good faith a plan (the "**Tram Supply Termination Plan**") for the procurement of a replacement Tram Supplier, including agreement in relation to:

12.11.1 the timing of termination of the Tram Supply Agreement;

12.11.2 interim arrangements for the provision of services provided under the Tram Supply Agreement whilst a replacement Tram Supplier is being procured;

12.11.3 changes (if any) to be made to the Tram Supply Agreement for the re-procurement and consequential amendments to this Agreement as a result;

12.11.4 actions of **tie** and Infraco required to complete the procurement and the programme for implementing the procurement.

12.12 If **tie** notifies the Infraco that it wishes to agree a Tram Supply Rectification Plan or that it consents to the termination of the Tram Supply Agreement, provided that the Infraco is not in breach of any of its obligations regarding payment for the supply of Trams, the Infraco's obligations (including the application of liquidated damages for delay in the supply of Trams or as a result of a delay in the supply of Trams) specifically relating to the supply of Trams under this Agreement or which Infraco may be prevented in performing as a result of the Tram Supplier's failure to perform under the Tram Supply Agreement shall be suspended from the date Infraco serves a notice under Clause 12.7 until the Tram Supply Rectification Plan is agreed or a replacement Tram Supplier is appointed. Negotiation and implementation of a Tram Supply Rectification Plan or Tram Supply Termination Plan, shall be a **tie** Change under Clause 80 (**tie Changes**).

- 12.13 Amendments to this agreement agreed as part of a Tram Supply Rectification Plan or Tram Supply Termination Plan will be a Mandatory **tie** Change under this Agreement.
- 12.14 Under no circumstances shall the Infraco serve any notice to terminate the Tram Supply Agreement until such time as either:
- 12.14.1 **tie** has notified Infraco of its approval to such termination pursuant to Clause 12.8 above; or
- 12.14.2 the Parties have not been able to agree the Tram Supply Rectification Plan pursuant to Clause 12.9 above.
- 12.15 If required by **tie**, on termination or expiry of this Agreement, the Infraco shall novate, assign or otherwise transfer the whole or any part of the Tram Supply Agreement, as directed by **tie**, to:
- 12.15.1 **tie**, the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than that of **tie**; or
- 12.15.2 to any other person whose obligations under the Tram Supply Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 12.15.1.
- In the case of such a novation or assignment, the Infraco shall be entitled, and **tie** shall assist the Infraco, to obtain a collateral warranty from the Tram Supplier.

13. NOVATION OF THE TRAM MAINTENANCE AGREEMENT TO THE INFRACO

- 13.1 **tie** intends to enter into or has entered into a tram maintenance agreement with the Tram Maintainer. It is one of the conditions precedent to this Agreement coming into full effect that the Infraco shall enter into and execute a novation agreement with **tie**, and the Tram Maintainer in the form set out in Schedule Part 20 (*Tram Maintenance Novation Agreement*). **tie** shall execute (if not already executed), and shall procure the execution by the Tram Maintainer (if not already executed) of such novation agreement and the Tram Maintenance Agreement.
- 13.2 On the last date of execution of the novation agreement referred to in Clause 13.1, **tie** and the Infraco shall, and the Infraco shall procure that the Tram Maintainer shall, execute a collateral warranty agreement in favour of **tie** in the form contained in Schedule Part 21 (*Tram Maintenance Collateral Warranty in favour of tie*) and the Infraco shall provide the same as executed to **tie** on that date.

- 13.3 The Infraco shall procure that the Tram Maintainer shall carry out and complete the Tram Maintenance Services in accordance with the Tram Maintenance Agreement.
- 13.4 The Infraco shall carry out all required management activities in order to manage the performance of the Tram Maintenance Services and, subject to any express limitations in this Agreement, the Infraco shall be wholly liable for the performance of the Tram Maintenance Services.
- 13.5 The Infraco shall not amend the Tram Maintenance Agreement (including the Tram Maintenance Services) without the prior written approval of **tie** (such approval not to be unreasonably withheld or delayed) provided that **tie's** consent shall be deemed to have been given in relation to any amendment to the Tram Maintenance Agreement (including the Tram Maintenance Services) which is directly required as a result of any Permitted Variation in so far as such amendment has been raised by the Infraco as part of the process of approving such Permitted Variation in accordance with this Agreement.
- 13.6 As reasonably required by **tie**, the Infraco shall procure the attendance of the Tram Maintainer at any meeting in relation to the Infraco Works.
- 13.7 Subject to the provisions of the Tram Maintenance Agreement, the Infraco shall use reasonable endeavours to procure that the Tram Maintainer shall supply any additional spare parts and/or perform any additional services which are required by **tie** in respect of the Edinburgh Tram Network and the requirement for any additional supply and/or services shall be a **tie** Change in accordance with Clause 80 (**tie** Changes).
- 13.8 Within 5 Business Days of becoming aware that the Tram Maintainer's continuing defective performance under the Tram Maintenance Agreement entitles, or is likely to entitle, the Infraco to serve a termination notice pursuant to the Tram Maintenance Agreement or entitles or is likely to entitle **tie** to serve a termination notice pursuant to this Agreement, the Infraco shall notify **tie**, such notification to include:
- 13.8.1 a statement that the Infraco has, or is likely to have, an entitlement to serve a termination notice on the Tram Maintainer pursuant to the Tram Maintenance Agreement;
- 13.8.2 the basis for and an explanation of the circumstances justifying such entitlement to serve the termination notice;
- 13.8.3 the actions, if any, that the Infraco has been able to take to rectify the Tram Maintainer's defective performance;

- 13.8.4 the Infraco's proposal to deliver the Infraco Works with an alternative Tram Maintainer or methodology for procuring an alternative Tram Maintainer; and
- 13.8.5 any obligations Infraco is prevented from or restricted in performing.
- 13.9 **tie** shall review the Infraco's notification and within 5 Business Days **tie** shall respond to the Infraco stating that:
- 13.9.1 it consents to the termination of the Tram Maintenance Agreement; or
- 13.9.2 it wishes to agree a comprehensive plan which will have as its objective sustainable rectification (measured against agreed programme and production criteria over a set period) of the Tram Maintainer's poor performance (the "**Tram Maintenance Rectification Plan**").
- 13.10 If **tie** notifies the Infraco of its intention to agree a Tram Maintenance Rectification Plan in accordance with Clause 13.9 above, the Parties, in such consultation with the Tram Maintainer as the Parties may agree, shall negotiate in good faith and use their reasonable endeavours to agree the Tram Maintenance Rectification Plan, which shall set out:
- 13.10.1 the actions required to be taken by each of **tie**, the Infraco and the Tram Maintainer in order to achieve the sustainable rectification (measured against an agreed revised programme and production criteria over a set period) of the Tram Maintainer's poor performance;
- 13.10.2 any specific alternative terms or modifications to the terms of the Tram Maintenance Agreement;
- 13.10.3 any specific alternative terms or modifications to the terms of this Agreement;
- such that neither Infraco or the Tram Maintainer will be in breach of the Tram Maintenance Agreement or this Agreement if the Tram Maintainer performs at that level.
- 13.11 If the Parties cannot agree the Tram Maintenance Rectification Plan within 60 Business Days of **tie** notifying the Infraco under Clause 13.9, then the Infraco shall be entitled to serve a termination notice on the Tram Maintainer.
- 13.12 If **tie** notifies Infraco that it consents to the termination of the Tram Maintenance Agreement the Parties shall meet and agree in good faith a plan (the "**Tram Maintenance Termination Plan**") for the procurement of a replacement Tram Maintainer, including agreement in relation to:

- 13.12.1 the timing of termination of the Tram Maintenance Agreement;
- 13.12.2 interim arrangements for the provision of services provided under the Tram Maintenance Agreement whilst a replacement Tram Maintainer is being procured;
- 13.12.3 changes (if any) to be made to the Tram Maintenance Agreement for the re-procurement and consequential amendments to this Agreement as a result; and
- 13.12.4 actions of **tie** and Infraco required to complete the procurement and the programme for implementing the procurement.
- 13.13 If **tie** notifies the Infraco that it wishes to agree a Tram Maintenance Rectification Plan or that it consents to the termination of the Tram Maintenance Agreement, provided that the Infraco is not in breach of any of its obligations regarding payment for the maintenance of Trams, the Infraco's obligations (including the application of liquidated damages for delay in the maintenance of Trams or as a result of a delay in the maintenance of Trams) specifically relating to the maintenance of Trams under this Agreement or which Infraco may be prevented in performing as a result of the Tram Maintainer's failure to perform under the Tram Maintenance Agreement shall be suspended from the date Infraco serves a notice under Clause 13.8 until the Tram Maintenance Rectification Plan is agreed or a replacement Tram Maintainer is appointed. Negotiation and implementation of a Tram Maintenance Rectification Plan or Tram Maintenance Termination Plan, shall be a **tie** Change under Clause 80 (**tie Changes**).
- 13.14 Amendments to this agreement agreed as part of a Tram Maintenance Rectification Plan or Tram Maintenance Termination Plan will be a Mandatory **tie** Change under this Agreement.
- 13.15 Under no circumstances shall the Infraco serve any notice to terminate the Tram Maintenance Agreement until such time as either:
- 13.15.1 **tie** has notified Infraco of its approval to such termination pursuant to Clause 13.9 above; or
- 13.15.2 the Parties have not been able to agree the Tram Maintenance Rectification Plan pursuant to Clause 13.10 above.
- 13.16 If required by **tie**, on termination or expiry of this Agreement, the Infraco shall novate, assign or otherwise transfer the whole or any part of the Tram Maintenance Agreement as directed by **tie**, to:

13.16.1 **tie**, the Operator, the Scottish Ministers, TEL, CEC, Transport Scotland or their successors with no worse financial standing than that of **tie**; or

13.16.2 to any other person whose obligations under the Tram Maintenance Agreement are unconditionally and irrevocably guaranteed by a person falling within Clause 13.16.1.

In the case of such a novation or assignation, the Infraco shall be entitled, and **tie** shall assist the Infraco, to obtain a collateral warranty from the SDS Provider.

14. TIE'S OBLIGATIONS

tie shall carry out and complete or procure the carrying out and completion of the works set out in Schedule Part 26 (*tie Obligations*) (by no later than the date Infraco requires such works to be completed to allow it to comply with the Programme and achieve the Sectional Completion Dates by the Planned Sectional Completion Dates). Should **tie** fail to carry out these obligations in accordance with the Programme, such failure shall be deemed to be a Notified Departure.

PART 4 - INTERFACES

15. LOCAL CODES OF CONSTRUCTION PRACTICE

15.1 In the event that **tie** requires to establish a Local Code of Construction Practice, the Infraco shall:

15.1.1 provide **tie** with all reasonable assistance required by **tie** in establishing such Local Code of Construction Practice;

15.1.2 provide **tie** with all reasonable assistance required by **tie** in the identification and settlement of any issues that such party requires **tie** to take account of in such Local Code of Construction Practice and

15.1.3 provide **tie** with method statements for the execution of the Infraco Works that are relevant to the establishment of such Local Code of Construction Practice.

15.2 If compliance with Clause 15.1.1 or 15.1.2 or implementation of the Infraco Works in accordance with any Local Code of Construction Practice, causes any delay in the completion of the Infraco Works, or disruption to the Infraco's construction methodology or the Infraco to incur additional cost, such compliance or implementation shall be a Compensation Event to which Clause 65 applies.

15.3 If, in implementing the Infraco Works under any such Local Code of Construction Practice, the Infraco's performance against the Programme, its productivity, or its construction methodology has improved then this shall be a **tie** Change under Clause 80 (*tie Changes*).

16. INTERFACE WITH NETWORK RAIL

16.1A The Infraco acknowledges that **tie** will enter into the Asset Protection Agreement with Network Rail in relation to the Edinburgh Tram Network.

16.1B The Infraco undertakes to comply with its obligations in relation to Clauses 16.1 to 16.73 (inclusive).

16.1 For the purposes of this Clause 16, the following expressions shall, unless the context otherwise requires, have the following meanings:

"**APA Commencement Date**" means the last date of execution of the Asset Protection Agreement;

"**APA Consent**" means all approvals, permissions, consents, licences, certificates, registrations and authorisations (whether statutory or otherwise) which are required from time to time for the purposes of carrying out the APA Works, including such required in order to comply with any law and, for the avoidance of doubt, any consent required in respect of any Regulated Change shall be a **tie** Consent whilst any consent required from any third party to enter and remain upon that third party's land shall be dealt with under Clause 18 (*Land Consents, Permanent Land and Temporary Sites*);

"**APA Deliverable**" means any Deliverable relating to the design and construction of the APA Works;

"**APA Works Programme**" means the programme for the carrying out and completion of the APA Works;

"**APA Works**" means that part of the Infraco Works which are included in "the Works" as defined in the Asset Protection Agreement;

"**Bridge Agreement(s)**" means the respective agreements to be entered into between Network Rail and CEC and/or **tie** relating to the maintenance and responsibility for the bridges carrying the Edinburgh Tram Network over the Network at Carrick Knowe and Edinburgh Park;

"**Contractor's Assurance Case**" has the meaning given to that term in standard RT/LS/P/016;

"Direct Costs" means direct costs reasonably incurred by Network Rail in relation to the Edinburgh Tram Network which, for the avoidance of doubt, excludes any loss of production, loss of profit, loss of revenue, loss of contracts or any indirect or consequential loss;

"Group Standards" means:

- (a) technical standards to which railway assets or equipment used on or as part of the Network must conform; and
- (b) operating procedures with which the operators of railway assets must comply,

in each case as issued by the Rail Safety and Standards Board Limited and authorised pursuant to the Railway Group Standard Code;

"Interfacing Project" means the Airdrie-Bathgate Railway and Linked Improvements Project, the Edinburgh to Glasgow Electrification Project and any Edinburgh to Glasgow Route Enhancements or maintenance and renewals activities on the Network adjacent to the areas of the APA Works notified by Network Rail to **tie** on or before the date of the Asset Protection Agreement;

"Network" means the railway network of which Network Rail is the facility owner (as defined in section 17(6) of the Act);

"Network Licence" means the licence to operate the Network granted to Network Rail pursuant to section 8 of the Act;

"Network Operation Issue" shall have the meaning ascribed to it in the Asset Protection Agreement;

"Network Rail Standard" means a standards document (or the equivalent of such document) issued by Network Rail for its own use as amended by Network Rail from time to time in relation to the Network as a whole which applies to the performance of the APA Works;

"Possession" means planned safety arrangements which control or prevent the normal movement of rail traffic on the Network between defined locations and for a pre-defined period (including any speed restrictions);

"Railway" means the Network and Network Rail's operation of it;

"Regulated Change" shall have the meaning ascribed to it in the Asset Protection Agreement;

"**Sector**" means any one of the sectors A to N forming part of the APA Works and identified in Schedule 1 (*Functional Specification*) of the Asset Protection Agreement;

"**Stage Gate Four**" means the approval stage reached following Network Rail's Guide to Railway Investment Projects when approval in principal is required, as may be amended from time to time;

"**Standards**" means Group Standards, Network Rail Standards and any equivalent standards or any standards replacing or superseding any of them;

"**Taking Into Use**" means the act of taking into use of the APA Works or part thereof, and the taking out of use of other assets by Network Rail on the basis that Network Rail is satisfied that the assets in question have been inspected, tested and commissioned, as applicable, in accordance with the requirements set out in the Asset Protection Agreement and "Take Into Use" and "Taken Into Use" shall be construed accordingly;

"**Works Commencement Date**" means the latest of:

- (a) the APA Commencement Date;
- (b) the date upon which all APA Consents (subject to any waivers agreed between the **tie** and Network Rail) have been obtained;
- (c) the date of completion of any preliminary works required to be carried out pursuant to Clause 3 of the Asset Protection Agreement;
- (d) the date on which all the requirements of Clauses 7.4 (other than Clauses 7.4.3 and 7.4.6 to 7.4.9) and 9.2.1 of the Asset Protection Agreement have been satisfied; and
- (e) the date of receipt of evidence confirming that CEC has taken out or has procured that **tie** has taken out the insurances required pursuant to the Asset Protection Agreement

and, for the purposes of paragraph (b) above, the requirement to obtain APA Consents in respect of the Regulated Change process is waived to the extent which will enable works commencement in respect of those Sectors which do not form part of the subject matter of the Regulated Change. Such APA Consents must be obtained prior to works commencement in respect of those Sectors which are the subject matter of the Regulated Change;

16.2 The Infraco acknowledges that, in relation to the APA Works, any consent, approval or agreement which is sought by or from **tie** or Network Rail shall be construed as requiring that such consent, approval or agreement shall not be unreasonably delayed or withheld. The

Infraco further acknowledges that Network Rail retains all discretion in relation to safety issues, and that nothing in the Asset Protection Agreement shall require Network Rail to give or procure the giving of any consent or approvals which are contrary to safety or the efficient operation of the railway or which would put Network Rail in breach of the law, the Network Licence or any Standard (subject to Clause 16.20). Where the Infraco has acted in compliance with the terms of the Infraco Contract, any such exercise of discretion by Network Rail which causes delay to the APA Works shall be a Compensation Event.

- 16.3 For the avoidance of doubt, where an APA Consent requires that a new agreement (arising after the Effective Date) is entered into with a third party, a **tie** Change will be required where the obligations under such agreement are to be treated as Third Party Obligations;
- 16.4 The Infraco shall provide **tie** with all reasonable assistance (which, for the avoidance of doubt, shall not include the provision of any undertakings, guarantees, collateral warranties (save as otherwise required under this Agreement) or indemnities) and such documentation as may be reasonably required by **tie** in relation to any Regulated Change process in respect of the Edinburgh Tram Network.
- 16.5 Prior to the commencement of the APA Works, the Infraco shall take all measures and carry out such protective works as may be necessary to protect the safety and continuity of the Railway or to protect any property belonging to Network Rail against instability or physical damage from anticipated ground movement due to the construction of the APA Works, or to prevent, address, alleviate or comply with any Network Operation Issue.
- 16.6 The Infraco shall produce construction methodology for and undertake measures during the execution of the Infraco Works which will minimise ground movement so far as is reasonably practicable and avoid ground movement which may be anticipated to cause physical damage (other than damage of a superficial nature) to property of Network Rail. If the Infraco anticipates that any Infraco Works, including ground consolidation works or soil movement is likely to cause such damage, it shall notify **tie** accordingly. The Infraco shall consult with **tie** in respect of the measures necessary to be taken and shall implement such required measures, such implementation to be at the cost of the Infraco.
- 16.7 The Infraco acknowledges that Network Rail may, following any safety incident in respect of the railway, take immediate action to rectify the safety issue. The Infraco shall not impede or interrupt Network Rail from undertaking such actions where such actions are in accordance with the Asset Protection Agreement. The Infraco shall immediately notify **tie** of any Network Rail proposal, action, or attempt to interrupt the APA Works or take any such action.

- 16.8 Subject to Clauses 16.72, 16.73, 77.2, 77.3, 77.7 and 77.8, the Infraco shall reimburse **tie** in respect of any losses reasonably incurred as a result of the Infraco failing to adhere to the requirements of Clauses 16.4 to 16.6.
- 16.9 The Infraco acknowledges that Network Rail has undertaken to **tie** to provide reasonable access to land in which Network Rail has an interest prior to the APA Works Commencement Date solely for the purposes of:
- 16.9.1 carrying out site surveys relating to the works and any protective works required under Clause 16.4 to 16.6 above;
- 16.9.2 carrying out a conditions and defects survey in respect of those parts of Network Rail property which are specified by **tie**; and
- 16.9.3 storage of materials on those areas notified by **tie** to the Infraco.
- 16.10 The Infraco shall notify **tie** of any plant equipment or materials which are intended to be stored on Network Rail's land for the purposes of **tie** obtaining Network Rail's written approval to such storage. Any such storage shall be at the sole risk of the Infraco and the Infraco shall take such security measures as **tie** considers reasonably necessary to prevent such materials being used to vandalise the Railway.
- 16.11 Network Rail shall (save as referred to in this clause 16.11) at all times have unlimited access to the land in which it has an interest for the purposes of monitoring the APA Works or addressing Network Operation Issues. The Infraco and **tie** acknowledge that Network Rail's rights of access in terms of the Asset Protection Agreement are subject to Network Rail using reasonable endeavours not to interfere, hinder or obstruct the carrying out of the APA Works by the Infraco, and to complying with any relevant safety requirements, rules or regulations. The Infraco shall immediately notify **tie** where it considers that Network Rail is failing to adhere to any of these obligations and, upon such notification, **tie** shall act under the Asset Protection Agreement in seeking to procure that Network Rail will adhere to the obligations.
- 16.12 The Infraco shall promptly notify **tie** of any information in relation to the APA Works which is reasonably required to be obtained from Network Rail in order to carry out the APA Works. The Infraco shall be responsible for any delay arising as a result of its failure to identify and notify **tie** of the need for such information.
- 16.13 The Infraco and **tie** acknowledge that Network Rail shall carry out or procure the carrying out of its obligations under the Asset Protection Agreement:

16.13.1 in accordance with Legal Requirements (as defined in the Asset Protection Agreement) and such other statutory requirements and mandatory standards as may be applicable to the rail industry from time to time (including the Safety Case (as defined in the Asset Protection Agreement));

16.13.2 in accordance with the terms of any APA Consents;

16.13.3 in a timely, economic and efficient manner, having regard at any particular time to Network Rail's obligations, purposes and duties as operator, renewer, maintainer and developer of the Network;

16.13.4 with that degree of skill, diligence and prudence which should be exercised by a skilled and experienced network operator and owner; and

16.13.5 in accordance with and subject to the terms of the Asset Protection Agreement.

The Infraco and **tie** further acknowledge that the standards set out in Clauses 16.13.1 to 16.13.4 are in descending order of priority so that in the event of any conflict between two or more of such standards Network Rail's obligation will be to act in accordance with the standard listed higher above.

16.14 The Infraco shall immediately notify **tie** in the event that Network Rail acts in a way which is not in accordance with Network Rail's obligations as described in Clause 16.13, or is otherwise acting in a manner which is of concern to the Infraco and, upon such notification, **tie** shall act under the Asset Protection Agreement in seeking to procure that Network Rail will adhere to its obligations; **tie** shall immediately notify and provide details to the Infraco in the event of Network Rail notifying **tie** of it becoming aware of any matter which will prevent or impede the carrying out of the APA Works.

16.15 The Infraco shall respond as soon as reasonably practicable to any request by **tie** for documentation or assistance to assist Network Rail in obtaining any consent necessary for the APA Works.

16.16 The Infraco shall prepare any APA Deliverable submission in line with its APA Works Programme and shall notify **tie** not less than 25 Business Days prior to any such submission.

16.17 Upon submittal of any APA Deliverable in relation to the APA Works, the Infraco shall provide a list of the Standards, legal requirements and other guidance and codes of practice which it has complied with in preparing such APA Deliverable, and shall ensure that any further information, data and documents that are reasonably required by **tie** are provided as

soon as reasonably practicable. The Infraco shall comply with any procedures and requirements notified by **tie** to the Infraco from time to time in relation to the submittal of APA Deliverables, whether or not consistent with Clause 10 (*Development, Review, and Finalisation of the Deliverables*).

- 16.18 Where an APA Deliverable is returned by **tie** and receives full approval, the Infraco shall be entitled to proceed with APA Works as specified in the APA Deliverable. Where any APA Deliverable is approved with comments, the relevant APA Works may proceed after the Works Commencement Date subject to the inclusion of the comments, and the Infraco shall record the means of achieving compliance with such comments in writing and promptly submit this to **tie**. In the event that approval is not received in respect of the APA Deliverable, the Infraco shall not act upon the APA Deliverable, but shall amend the APA Deliverable in accordance with comments received and shall resubmit the same.
- 16.19 The Infraco shall not commence detailed design of any part of the APA Works until **tie** has confirmed to the Infraco that Network Rail has approved all relevant APA Deliverables.
- 16.20 The Infraco shall, and shall procure that each of its subcontractors shall, meet the requirements of Network Rail's Link Up Accreditation for all relevant classes of APA Works to be carried out by the Infraco or the particular subcontractor. The Infraco shall, when required by the Infraco, demonstrate that both it and its subcontractors hold the relevant certificate from Network Rail confirming that it and its subcontractor has a Contractor's Assurance Case.
- 16.21 The Infraco shall design, procure and carry out each element of the APA Works in accordance with all Standards as at the date that such element of the APA Works passes Stage Gate Four and any change of Standards for safety reasons thereafter or such derogations from the Standards as Network Rail and/or the relevant Approval Bodies may approve or consent to in writing. The Infraco shall design, procure and carry out the APA Works in accordance with the requirements which Network Rail are entitled to stipulate to **tie** under the Asset Protection Agreement.
- 16.22 The Infraco shall ensure that design of the APA Works is such as to enable construction of the APA Works in a manner which minimises disruption to the Railway and enables future construction or maintenance to be carried out on the rail Network and which, as far as is reasonably possible, minimises costs and disruption to the rail Network during construction or maintenance.
- 16.23 The Infraco shall meet with Network Rail and/or **tie** as may reasonably be required on reasonable notice during the Term in respect of matters to which clauses 7.2.5, 7.4.3 and 8.13

of the Asset Protection Agreement refer but only in the event and to the extent that the Infraco otherwise has ongoing obligations under the Infraco Contract in respect of such matters or as may be agreed between the Parties acting reasonably.

- 16.24 Prior to commencing the construction of the APA Works, the Infraco and each subcontractor shall produce a quality plan, environmental plan, and a safety plan specific to the APA Works in order to satisfy the requirements of achieving a Network Rail Contractor Assurance Case.
- 16.25 The Infraco shall prepare, in accordance with any reasonable requirements which **tie** may have, any documentation required by Network Rail to enable Network Rail to obtain Consents necessary for the APA Works. Any modification of the design and construction process necessary to secure such consents can be obtained shall be a **tie** Change save to the extent that the need for such modification arises due to a failure by the Infraco to anticipate the requirements in question in breach of Clause 7.1.
- 16.26 Where Network Rail obtain a consent necessary for the APA Works, **tie** shall supply the Infraco with copies of the approved drawings together with supporting design and check certificates and contract documents for the Infraco's use during the carrying out of the APA Works.
- 16.27 Where **tie** are obliged to obtain a consent necessary for the APA Works, the Infraco shall provide all reasonable assistance (which for the avoidance of doubt, shall not include the provision of any undertakings, guarantees, collateral warranties (save as otherwise required under this Agreement) or indemnities) to **tie** in obtaining consents for which **tie** are responsible (and in maintaining those consents during the Term but in that case only in so far as referable to the proper requirements of the Independent Competent Person or otherwise arising from a Bridge Agreement (following notification of execution by **tie** under Clause 16.55.4) to the extent that the Infraco is not relieved from such obligations under Clause 16.45, in circumstances where the need for and nature of such assistance ought reasonably to be anticipated in the exercise of the level of skill, care and diligence referred to in Clause 7.1.
- 16.28 Following completion of any Sector in relation to the APA Works, the Infraco shall remove from and leave such completed Sector clear of plant equipment and materials not reasonably required in respect of the ongoing obligations of the Infraco in respect of the APA Works and site thereof.
- 16.29 The Infraco shall ensure that, during the Term, neither it nor any of its subcontractors shall interfere with the availability of suitable access and egress rights into and from Haymarket Depot for all necessary purposes at all times to the reasonable satisfaction of Network Rail.

- 16.30 The Infraco shall not and shall not allow or permit or submit anything to be done by it or any of its subcontractors, which would adversely affect the continuous operation of train refuelling equipment and fuel tanks at Haymarket Depot. The Infraco shall ensure that, during the Term, neither it nor any of its subcontractors shall interfere with the safe and suitable access to such equipment and fuels tanks for all necessary purposes at all times to the reasonable satisfaction of Network Rail.
- 16.31 The Infraco shall ensure that all elements of the APA Works which relate to new or existing over-bridges, under-bridges and foot-bridges will comply with the Standards (subject to Clause 16.20) and the requirements of HMRI.
- 16.32 The Infraco shall, prior to the commencement of the APA Works, carry out a condition and defects survey in respect of the land coloured pink in the plans set out in Schedule Part 8 of the Asset Protection Agreement.
- 16.33 The Infraco shall submit an APA Works Programme for approval in principle by **tie** and Network Rail prior to the APA Works Commencement Date and shall do so sufficiently in advance of such date so as to allow **tie** and Network Rail a reasonable period in which to provide their approval. Such APA Works Programme shall include:
- 16.33.1 all submission dates for approval of APA Deliverables;
 - 16.33.2 submission data work package plans;
 - 16.33.3 the proposed detailed possession plan;
 - 16.33.4 details of all survey works;
 - 16.33.5 works inspection and testing plans;
 - 16.33.6 take-over and commissioning plans;
 - 16.33.7 details of interaction with any Interfacing Projects and how these will affect the programme; and
 - 16.33.8 verification of the critical path activities.
- tie** acknowledges that Network Rail is obliged in terms of the Asset Protection Agreement to both act reasonably and to co-operate in the planning and development of an APA Works Programme.

- 16.34 If this APA Works Programme is not sufficiently developed prior to the APA Works Commencement Date for approval, the Infraco shall, as soon as reasonably practicable, submit a full APA Works Programme in compliance with Clause 16.32 above, and shall liaise with **tie** in respect of revising such APA Works Programme until it is approved. The Infraco shall use reasonable endeavours to ensure that it has minimised the disruptive possession requirements in consultation with **tie** and Network Rail. The Infraco shall undertake the arrangements reasonably required by **tie** in respect of the interface of the APA Works with the Interfacing Projects through the agreed point(s) of contact notified by **tie**. The Infraco shall comply with the reasonable requirements of **tie** in respect of the procurement of necessary resources to facilitate the use of possessions on the dates identified in the APA Works Programme (as updated from time to time in accordance with this Clause 16 (*Interface with Network Rail*)).
- 16.35 The Infraco shall, where required by **tie**, produce a revised programme and possession dates where it becomes clear, in consultation with **tie**, that in the reasonable opinion of **tie** the progress of the APA Works is not sufficient to meet the previously agreed programme and possessions timetable.
- 16.36 The Infraco shall act with all due expedition in relation to consultation and development of plans which will affect the time table for Possessions. In the event that the Infraco is responsible for any delay which renders any Possession obsolete or insufficient for the purposes of the APA Works, the Infraco shall reimburse **tie** for all costs associated with the Possession(s) which are cancelled or not used as a result and the Infraco shall not be entitled to an extension of time, additional payment or relief in such circumstances.
- 16.37 The Infraco shall not commence any part of the APA Works prior to the APA Works Commencement Date.
- 16.38 Prior to undertaking each particular part of the APA Works, the Infraco shall:
- 16.38.1 obtain **tie's** prior written approval (not to be unreasonably withheld) to the APA Works Programme and method statement for the carrying out and completion of that particular part of the APA Works and any associated movement of materials, plant and equipment on or near the railway;
- 16.38.2 in relation to any APA Works to be undertaken in an area which is the subject of a Regulated Change process, await a notice to proceed from **tie** in respect of this part of the APA Works prior to commencing works in the areas which are subject to the Regulated Change. A **tie** Change shall occur if such a notice to proceed is not issued in accordance with the agreed APA Works Programme.

16.39 During the construction of the APA Works the Infraco shall:

16.39.1 take all steps required to ensure that the APA Works are carried out in a way that minimises disruption to the railway and any third party using it or having an interest in the land affected by the APA Works;

16.39.2 establish and maintain a robust procedure to ensure the safe access for all authorised personnel to the railway in connection with the Works;

16.39.3 not interfere, and ensure that no subcontractor interferes, with existing points of emergency access to the network without **tie** having obtained the prior agreement of Network Rail in writing;

16.39.4 submit in writing for the approval of **tie** (such approval not to be unreasonably withheld) any proposals for the provision of personnel to supervise Possessions or the APA Works;

16.39.5 carry out the APA Works efficiently at such times and in such a way as to minimise, in so far as is reasonably practicable, any interference with traffic operating on the rail network;

16.39.6 carry out the APA Works to the satisfaction of **tie** and Network Rail in respect of the protection, safety and efficient operation of the railway and the safety of persons and property on or near the railway;

16.39.7 procure that all materials and goods used in the APA Works shall be new, of good quality, suitable for their purpose, in compliance with all applicable Standards (subject to Clause 16.20) and not generally known in the railway industry to be deleterious at the time of incorporation;

16.39.8 maintain the APA Works until Completion of "the Works" as defined in the Asset Protection Agreement.

16.39.9 cause the APA Works to be completed with all reasonable dispatch and in any event by 30 June 2011, as such date may be extended with consent of **tie**;

16.39.10 arrange for the relocation to a suitable environment of any flora and fauna which is subject to conservation and which may be affected by the APA Works;

16.39.11 temporarily erect fencing to protect the network from trespass and vandalism to the reasonable satisfaction of **tie** and Network Rail;

- 16.39.12 provide for such barriers, supervision, and lighting of the APA Works as may be reasonably specified by **tie** as being necessary during the carrying out of the APA Works;
- 16.39.13 comply with the requirements of Network Rail with regard to Network Rail's signalling arrangements and the prevention of any adverse effects which may be caused by the lighting of the APA Works;
- 16.39.14 provide **tie** with reasonable notice in writing of any inspections or testing of the APA Works by the Infraco or its subcontractors and allow **tie** the opportunity to procure Network Rail attendance at such inspection, demonstration or testing;
- 16.39.15 notify **tie** in writing once it considers (a) a Sector has been completed is capable of being certified as completed and (b) the APA Works have been completed and are capable of being certified as being completed;
- 16.39.16 provide **tie** with such information at such times and in such form as **tie** may reasonably require about the APA Works to enable Network Rail to populate its asset register.
- 16.40 The Infraco shall consult with **tie** and Network Rail and prepare a Construction Phase Plan (as defined in the CDM Regulations) for the APA Works alone, and submit it to **tie**. The Infraco shall amend such plan to take account of any reasonable comments made by **tie** or passed on from Network Rail.
- 16.41 The Infraco shall prepare a relevant data manual for the APA Works alone to form part of the health and safety file for CDM purposes. The manual shall be finalised and passed to **tie** for onward delivery to Network Rail with such number of copies as Network Rail may reasonably require prior to completion of the APA Works.
- 16.42 The Infraco shall use reasonable endeavours to identify any relationship between the APA Works and Interfacing Projects which have been notified to it by **tie** or Network Rail. The Infraco shall mitigate and control the APA Works elements of such interface as far as is reasonably practicable.
- 16.43 The Infraco shall at its own cost make good any property of Network Rail which has been damaged or interfered with in during the course of the APA Works, and shall carry out any remedial work as may be required to ensure that the APA Works comply with the Asset Protection Agreement. The Infraco shall carry out any demonstrations or tests for any part of

the APA Works which are reasonably required by **tie** as a result of such damage, interference or remedial work under this Clause 16.42 at its own cost.

16.44 The Infraco acknowledges that Network Rail may require **tie** to suspend the carrying out of the APA Works when Network Rail has notified **tie** that such suspension is necessary in order to prevent, address, alleviate or comply with a Network Operation Issue (and that **tie** may in such an event instruct Infraco to suspend the APA Works to the extent necessary to comply with Network Rail's requirement; provided that Network Rail has complied with the restrictions upon it in this regard set out in clauses 10.2 and 10.3 of the Asset Protection Agreement. Any such suspension shall be a Compensation Event to the extent that such suspension has not been caused by any act or omission of the Infraco.

16.45 The Infraco shall from notification of execution of each Bridge Agreement by **tie** under Clause 16.55.4 until the expiry of the Term comply with the terms of each of the Bridge Agreements, save where the terms of such Bridge Agreement are inconsistent with the draft Bridge Agreement in the Schedule Part 27 Section B (*Asset Protection Agreement and Bridge Agreement*), and provided that:

16.45.1 reference in the Bridge Agreement to "in accordance with the Asset Protection Agreement" shall be construed for the purposes of this Clause 16.45 as being in accordance with Clause 16.1 of this Agreement;

16.45.2 the Infraco shall not be responsible for any costs of Network Rail arising under the Bridge Agreement;

16.45.3 Clause 16.20 shall apply to the Standards relevant to the Bridge Agreement;

16.45.4 if Network Rail exercise a right to fix apparatus under the Bridge Agreement, any impact on the Infraco shall be treated as a **tie** Change;

16.45.5 the Infraco shall incur no liability under the Bridge Agreement in respect of future railway alterations; and

16.45.6 for the avoidance of doubt, the liability of the Infraco in respect of the compliance with the Bridge Agreements remains subject to Clauses 77.2, 77.3, 77.7, 77.8, 16.72 and 16.73;

16.46 Prior to Network Rail taking any action or ordering any suspension envisaged to which Clause 16.44 would apply, **tie** shall involve the Infraco in consultation with itself and Network Rail in order to identify the best course of action in relation to the Network Operation Issue. **tie** shall

provide the Infraco with all information which it receives from Network Rail in relation to the Network Operation Issue, including updates in relation to the estimates of any duration of suspension, and shall notify the Infraco as soon as practicable once the APA Works can be resumed.

- 16.47 Where **tie** requires the Infraco to take any action as the result of an instruction from Network Rail in respect of a Network Operation Issue, the Infraco and **tie** acknowledge that Network Rail is entitled to issue instructions directly to the Infraco where **tie** is not available. The Infraco and **tie** acknowledge that, for these purposes, such direct instructions from Network Rail shall be treated as an instruction from **tie's** Representative under Clause 25 (*tie's Representative*).
- 16.48 The Infraco and **tie** shall exchange information and otherwise cooperate with each other in accordance with the reasonable requirements of Network Rail, so far as is necessary to enable Network Rail to review and revise its safety regime relating to maintenance, repair, improvement, alteration and operation of the Railway during the construction of the APA Works and for a period of 12 months following completion of the APA Works.
- 16.49 The Infraco acknowledges that Network Rail may inspect the APA Works (including ultrasonic examination of the operational track) at any time prior to the date of Taking Into Use and **tie** shall inform the Infraco of any areas requiring such attention and the level of priority for such work. The Infraco shall carry out such work within the time-scale specified within the Standards (subject to Clause 16.20). If the Infraco unreasonably fails to do so, it acknowledges that Network Rail is entitled to undertake such corrective or remedial work itself and recover the costs thereof from **tie** (subject to **tie** being entitled to recover such costs where the measures and/or timescales are determined to have been disproportionate or unnecessary under the Dispute Resolution Procedure as defined in the Asset Protection Agreement), and **tie** shall be entitled to recover such costs from the Infraco, subject to Clauses 77.2, 77.3, 77.7, 77.8, 16.72 and 16.73.
- 16.50 The Infraco shall comply with the reasonable requirements of Network Rail in respect of Taking Into Use of the APA Works to the extent that such are to be Taken Into Use, and to provide Network Rail with reasonable assistance in respect of these procedures and the procedures for certifying completion of a Sector of the APA Works and those applicable to completion of the APA Works as a whole.
- 16.51 Following completion of the APA Works, the Infraco will:

- 16.51.1 within two years (but not less than 18 months) of the completion of the APA Works, repeat the condition and defects survey required under Clause 16.32 in adherence with the access requirement and procedures agreed with Network Rail in relation to the APA Works;
- 16.51.2 make good any damage caused to Network Rail property by the carrying out and completion of the APA Works and, subject to intended alterations arising as a consequence of the APA Works, reinstate all Network Rail property so damaged to a condition substantially the same as existed at the APA Works Commencement Date as evidenced by the condition and defects survey; and
- 16.51.3 carry out and complete rectification and remedial works which may be necessary as a consequence of the Infraco or any subcontractor failing to carry out and complete the APA Works in accordance with the Asset Protection Agreement. In the event that the Infraco does not carry out such works within three months of completion of the APA works, it acknowledges that Network Rail may carry out such works and recover the costs thereof from **tie**, and **tie** shall be entitled to recover such costs from the Infraco.
- 16.52 The Infraco shall not use or operate or permit any third party to use or operate any operational Railway track (other than for testing as agreed with Network Rail and **tie**). The Infraco shall not, and shall procure that no other party shall, use or operate any of the APA Works or areas in which the Infraco has been working for commercial purposes.
- 16.53 The Infraco acknowledges that if, in consequence of the construction of the APA Works or existence of the APA Works, Network Rail incurs additional costs and expense in connection with the repair, maintenance, improvement, operation or alteration of the Railway which would not have been incurred but for the construction of the APA Works or existence of the APA Works, and in so far as such additional cost or expense arises as a result of Infraco's breach of the Infraco Contract, such additional cost or expense shall be paid by **tie** to Network Rail, and **tie** shall be entitled to recover such additional expense from the Infraco, provided that such additional expense is incurred prior to 1 April 2014 and subject to Clauses 77.2, 77.3, 77.7, 77.8, 16.72 and 16.73.
- 16.54 The Infraco acknowledges that in the event of acts of trespass or vandalism occurring on or from the Site (or on or from a bridge or its approaches under a Bridge Agreements(following notification of execution by **tie** under Clause 16.55.4)) which endangers the safety of the railway or the safety of Network Rail property or persons on or near the Railway, Network Rail may (subject to the terms of Clause 12.8 of the Asset Protection Agreement or Clause 2.11 of the Bridge Agreement, as the case may be) take immediate action at the cost of **tie** to

safeguard the Railway or such person or property. Where such actions are properly taken prior to the Completion of the Works (as defined in the Asset Protection Agreement) or, at any time in the case of a Bridge Agreement issue, and are necessary as a result of the Infraco's failure to implement security obligations in accordance with the Infraco Contract, the Infraco shall reimburse **tie** for any such costs, subject to Clauses 77.2, 77.3, 77.7, 77.8, 16.72, and 16.73.

16.55 From the date set for completion of the relevant Sector of the APA Works until (a) in the case of those parts of the APA Works that are to be Taken Into Use, the date that the relevant Sector or part thereof is Taken Into Use; (b) in the case of those parts of the APA Works which shall be the subject of any Bridge Agreement, the date of execution of the relevant Bridge Agreement; and (c) in the case of those parts of the APA Works which are not to be Taken Into Use or are not to be the subject of any Bridge Agreement, the date of completion of the APA Works as a whole (such parts of the APA Works being in each case hereinafter referred to as the "**Completed Areas**");

16.55.1 To the extent that the APA Works were undertaken by the Infraco, the Infraco shall be responsible for maintaining such Completed Areas in good and substantial order and repair to the reasonable satisfaction of **tie** and shall secure these Completed Areas against acts of trespass or vandalism;

16.55.2 subject to the terms of the Agreement, the Infraco shall assume all risk and responsibility for loss, damage or destruction of the Completed Areas and for the costs of rectifying or reinstating such loss, damage or destruction (provided that the Infraco shall not be responsible for any loss, damage or destruction caused or arising as a result of the acts or omissions of Network Rail of any person for whom Network Rail is responsible);

16.55.3 the Infraco shall immediately notify **tie** if it considers that Network Rail is not providing access which is reasonably sufficient in order to undertake its obligations under this Clause 16.55.

16.55.4 **tie** will immediately notify the Infraco when any Bridge Agreement is executed and provide the Infraco with a certified true copy of the same.

16.56 Following the date of completion of any Sector, the Infraco shall be entitled to occupy and use such areas and maintain them subject always to the reasonable conditions of Network Rail. The right to occupy and use such areas shall subsist from:

16.56.1 the date of Sector completion for each Sector in respect of allowing the Infraco to secure the area, undertake reasonable inspection and rectify defects arising in respect of the completed Sector;

16.56.2 the date which is the later of (a) the date of completion of the APA Works as a whole and (b) the date upon which **tie** confirms to the Infraco that procedures are agreed between all relevant parties in respect of testing, commissioning and trial running of the passenger tramway (including driver training);

16.56.3 and until the Service Commencement Date;

The right to occupy and use is not granted for any other purpose unless expressly permitted under the Asset Protection Agreement.

16.57 Subject to clauses 77.2, 77.3, 77.7, 77.8, 16.72 and 16.73, the Infraco shall indemnify and keep indemnified **tie** from liability to Network Rail arising in any way directly out of the occupancy or use by the Infraco, or any act, failure or negligence or omission of the Infraco or any subcontractor in respect of any Completed Area.

16.58 Subject to Clauses 16.59 to 16.63 below, variations to the APA Works howsoever arising (each an "**APA Variation**") shall be dealt with in accordance with the provisions of Clause 80 (*tie Changes*) and Clause 81 (*Infraco Changes*).

16.59 Where the Infraco reasonably believes that a variation is required to the APA Works (an "**Infraco APA Variation**"), it shall promptly notify **tie** of that fact and shall, as soon as is practicable thereafter, provide **tie** with full details of the reason why it considers that an Infraco APA Variation is required. The Infraco acknowledges that **tie** is required to notify Network Rail of any such variations and will use its reasonable endeavours to respond promptly to **tie** in respect of any queries which arise in relation to the variation proposal. Where it is agreed between **tie** and Network Rail that such Infraco APA Variation is required, then this shall be an Infraco Change.

16.60 The Infraco acknowledges that, in relation to any proposed variation of the APA Works, information is required by **tie** to provide Network Rail with details of the steps that the Infraco proposes to take in order to implement the variation, and that details of the Infraco's view of any APA Consents which must be obtained or amended for the purposes of the APA Variation must also be supplied. The Infraco shall promptly prepare and supply **tie** with any such information as soon as reasonably practicable, and in any event to allow **tie** to comply

with its obligations to Network Rail within the timescales set out in the Asset Protection Agreement.

- 16.61 As reasonably required by **tie**, the Infraco shall meet with **tie** and Network Rail to agree matters such as alterations to the APA Works Programme, the requirement for additional Possessions, the impact on Direct Costs and any amendments needed to the APA Works requirements in relation to an APA Variation following approval in principle by Network Rail of the same.
- 16.62 The Infraco shall as between Infraco and **tie** be responsible for any Direct Costs which Network Rail incurs in connection with any Infraco APA Variation. The Infraco shall within 15 Business Days pay to **tie** on behalf of Network Rail any such Direct Costs which are properly due and notified to the Infraco by **tie** with supporting vouching.
- 16.63 Where in terms of the provisions of Clause 80 (*tie Changes*) and Clause 81 (*Infraco Changes*), as applicable, an APA Variation is to proceed and requires that additional APA Works are to be executed in respect of a Sector for which Sector completion has been certified, the Infraco shall undertake reasonable endeavours to ensure that a re-certification of that Sector can be undertaken by Network Rail once the APA Variation in question has been implemented.
- 16.64 The Infraco acknowledges the circumstances in clauses 3.6, 11.1 and 14 of the Asset Protection Agreement which entitle **tie** or CEC to recover from Network Rail Direct Costs and/or relief. The Infraco agrees to supply all information practicably obtainable in so far as reasonably required by **tie** within the timescale specified in the Asset Protection Agreement so as to enable **tie** to make a claim against Network Rail where such circumstances arise. In the event the **tie** should have been able to claim against Network Rail, but were unable to do so due to a failure of the Infraco to identify and/or provide information due as aforesaid in relation to the event to which the claim relates, the Infraco will not be able to make a claim against **tie** for costs, or make any claim under Clause 64 (*Relief Events*) or 65 (*Compensation Events*).
- 16.65 Where Infraco reasonably believes that a claim or action is required to be taken against Network Rail in association with the requirements of the APA Works, it shall immediately notify **tie** and provide all reasonable assistance in order to formulate and conduct such claim or action.
- 16.66 Subject to the terms of the Infraco Contract (including, without prejudice to the foregoing generality, Clauses 77.2, 77.3, 77.7, 77.8, 16.72, and 16.73) the Infraco shall indemnify and keep indemnified **tie** for all reasonable Direct Costs incurred during the Term in relation to

any negligence, breach of the Infraco Contract, act or omission of the Infraco in relation to electromagnetic interference originating from the APA Works and the effect thereof on Network Rail and the rail Network during and after construction of the APA Works which arises during the Term;

- 16.67 The Infraco shall give **tie** all reasonably required information in connection with any claim arising under the Asset Protection Agreement during the Term.
- 16.68 The Infraco acknowledges the events of termination arising under clause 21 of the Asset Protection Agreement, and shall immediately notify **tie** in the event that the Infraco considers that any event, act or omission has occurred which may entitle termination by either Network Rail or **tie** under that clause.
- 16.69 Subject to Clauses 16.72 and 16.73, the Infraco agrees to take such reasonable steps as are notified to it by **tie** or Network Rail to rectify any breaches, acts or omissions by the Infraco of its obligations under the Agreement which may entitle Network Rail to terminate the Asset Protection Agreement.
- 16.70 Subject to Clause 16.72 and 16.73, the Infraco acknowledges the circumstances in clauses 12.11 and 20 of the Asset Protection Agreement under which Network Rail may recover monies from CEC or **tie** , and undertakes when reasonably requested by **tie** to use reasonable endeavours to mitigate the circumstances under which Network Rail may make such a claim against **tie** or CEC.
- 16.71 **tie** and the Infraco each acknowledge that any notice, objection or communication to be given by the Infraco in relation to the APA Works, which may be required to be communicated to Network Rail, will necessarily involve a review by Network Rail in order to respond to such notice, objection or communication. **tie** and the Infraco shall act reasonably in giving such notice, objection or communication in order to allow Network Rail an adequate period for review and providing Network Rail with sufficient information to undertake such review.
- 16.72 Notwithstanding any other provision of the Infraco Contract, the Infraco's liability and extent of any obligations of any nature in respect of : (1) any failure to handback any part of the Network after the planned expiry of a Possession; or (2) any claim of any nature arising from the terms of any Track Access Agreement, Freight Access Agreement or any contract in any way incorporating the Depot Access Conditions or the Station Access Conditions (such terms having the meaning ascribed to them in the Asset Protection Agreement) shall be limited to £40,000 for each and every incident subject to an aggregate limit of £500,000 for all such liabilities, obligations or claims – and that subject to Clauses 77.2, 77.3, 77.7, 77.8, and 16.73.

16.73 Notwithstanding any other provision of the Infraco Contract, the Infraco's liability and extent of any obligations of any nature in respect of NR Immunisation shall be subject to an aggregate limit of £750,000 for all such liabilities, obligations or claims – and that subject to Clauses 77.2, 77.3, 77.7, 77.8 and 16.72. This Clause 16.73 shall not apply to the elements of NR Immunisation costs referred to in the Schedule Part 4 Appendix J Paragraph 3 (*Pricing*).

17. INTERFACE WITH THE OPERATOR

Operator Events

17.1 Nothing in this Clause 17 (*Interface with the Operator*) shall modify or dilute the general or specific obligations of the Infraco which concern interface or co-operation with the Operator.

17.2 Subject to Clauses 17.3 and 17.4 in the event that any of the events or circumstances defined as Operator Events occur and to the extent that the Infraco can demonstrate to **tie's** satisfaction, **tie** acting reasonably, that there has been a resultant material adverse effect on the Infraco's ability to perform any of its obligations or exercise any of its rights pursuant to this Agreement the Operator Event shall be a Compensation Event and the Infraco shall be entitled to relief and/or compensation on the basis set out in Clause 65 (*Compensation Events*) in respect of such Operator Event provided that where Infraco has predominantly caused or materially contributed to the occurrence effect or duration of the Operator Event the compensation available to Infraco pursuant to Clause 65 (*Compensation Events*) shall be reduced to the extent of such causation or contribution.

17.3 If any Operator Event occurs, the Infraco shall:

17.3.1 notify **tie** and the Operator as soon as practicable after being on notice of the Operator Event (and in any case no later than 1 day after being on initial notice of the Operator Event) of the occurrence of the Operator Event and, as soon as reasonably practicable after such notification from the Infraco (and in any case no later than 2 Business Days after such notification or such longer period as agreed between the Parties), the Infraco shall notify **tie** and the Operator of the likely occurrence, severity (including additional costs) and duration of the Operator Event and any likely impact on the ability of the Infraco and/or any Infraco Party to perform its obligations in relation to the Infraco Works; and

17.3.2 NOT USED

17.3.3 be responsible for recording the effects of the Operator Event on the ability of the Infraco and/or any Infraco Party to perform its obligations in relation to the Infraco

Works and for providing **tie** with an accurate and comprehensive report on such effects of the Operator Event within 5 Business Days of being on notice of such Operator Event, such report to detail emerging additional costs and expected (or actual) duration of this Operator Event.

- 17.4 The Infraco shall take all reasonable measures to prevent and to mitigate any Operator Event from materially adversely affecting the proper performance of the Infraco Works (including the Maintenance Services) provided that the Infraco can do so without unreasonable inconvenience or cost.
- 17.5 **tie** shall arrange a meeting with the Operator, the Infraco, **tie** and **tie's** Representative to discuss and agree a plan for corrective measures necessary to address any Operator Event and to permit the Infraco to resume unrestricted (or the best, even if restricted, level of) performance of the Infraco Works within the shortest practicable time period. It shall be the **tie's** responsibility to obtain the Operator's cooperation with any corrective measures agreed by the Parties to be taken by the Infraco, whether temporary or permanent.
- 17.6 NOT USED
- 17.7 The Infraco shall be under a continuing obligation to report promptly, and in any event within 2 Business Days, upon becoming aware of same, to the Operator and to **tie** any incident, matter or operational irregularity which may precede the occurrence or indicate the existence of an Operator Event.

Design Input and Technical Requirements

- 17.8 In accordance with Schedule Part 14 (*Review Procedure*), the Infraco shall, from the Effective Date of this Agreement, take account of any comments from **tie** in relation to operational issues when refining its Design, Maintenance Plans, standards, procedures and safety documentation in accordance with Schedule Part 2 (*Employer's Requirements*) and when ensuring system integration in accordance with Clause 8 (*System Integration*). The Infraco shall as part of the Mobilisation Services comment on maintainability issues and provide review and support during the design and construction process, seeking to optimise the whole life asset cost. These comments shall be deliverable to the Operator in addition to **tie**.

Operation and Maintenance Procedures

- 17.9 The Infraco acknowledges that the Operator shall be responsible for Operator Maintenance of the Edinburgh Tram Network. The Infraco shall not obstruct the performance by the Operator of the Operator Maintenance. **tie** shall procure that the Operator does not obstruct the

performance by the Infraco or any Infraco Party of the Maintenance Services. The Infraco shall liaise with the Operator in relation to the Maintenance Services and Operator Maintenance.

17.10 Subject to Clause 17.10.3 Infraco acknowledges that **tie** and the Operator may agree from time to time to delegate to the Operator the exercise of **tie's** contractual rights under this Agreement. Where **tie** delegates the exercise of any of its contractual rights under this Agreement the provisions of this Clause 17.10 shall apply.

17.10.1 Subject to Clause 17.10.4, **tie** may from time to time by notice in writing to the Infraco, delegate the exercise of specific contractual rights to a suitable specified employee of the Operator (the "**Operator's Representative**").

17.10.2 The Infraco shall observe, and shall procure that any Infraco Parties observe, all reasonable instructions of Operator's Representative given in accordance with this Agreement.

17.10.3 The Operator's Representative shall have no authority to terminate this Agreement, make any claim for payment (under indemnity or otherwise), raise any claim, suit or action against the Infraco, instruct a **tie** Change, amend this Agreement nor to relieve the Infraco of any of its obligations under this Agreement.

17.10.4 **tie** may by notice in writing to the Infraco change the identity of the Operator's Representative. **tie** shall consult with the Infraco prior to the appointment of or replacement for Operator's Representative, taking account of the need for liaison and continuity in respect of this Agreement. Such appointment or change shall have effect on the date specified in the written notice.

17.10.5 During any period when an Operator's Representative has not been appointed (or when the Operator's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement), **tie** shall carry out the functions which would otherwise be performed by the Operator's Representative.

17.10.6 Instructions given by the Operator's Representative under Clause 17.10 and 17.11 shall be in writing. Provided that if for any reason it is considered necessary to give any such instruction orally the Infraco shall comply therewith.

17.10.7 Any such oral instruction shall be confirmed in writing as soon as is possible under the circumstances. Provided that if the Infraco confirms in writing any such oral

instruction which confirmation is not contradicted in writing by the Operator's Representative or **tie's** Representative forthwith it shall be deemed to be an instruction in writing by the Operator's Representative.

17.10.8 Upon the written request of the Infraco, **tie's** Representative shall specify in writing under which of his duties and authorities the instruction is given.

17.10.9 **tie** shall procure that any Operator's Representative shall not exercise their delegated contractual rights in a way which is likely to interfere with the discharge of Infraco's obligations under this Agreement.

17.11 The Infraco shall:

17.11.1 promptly notify the Operator and **tie** of any requirement for Operator Maintenance of which the Infraco becomes aware; and

17.11.2 co-operate with the Operator in relation to the planning and execution of Operator Maintenance and Maintenance Services.

17.12 If, at any time after the Service Commencement Date, it appears likely to the Infraco that any planned works or activities (including Maintenance Services) to be carried out by the Infraco will necessitate interruption to or restriction of the Transport Services on the Edinburgh Tram Network, the Infraco (as appropriate) shall:

17.12.1 notify **tie** and the Operator not less than 42 days prior to such planned works or activities, and take all reasonable steps to support **tie** in notifying passengers as soon as reasonably practicable in advance of the carrying out of such planned works or activities, of the nature of such work and the likely disruption or restriction of the Transport Services; and

17.12.2 take all steps which are reasonably practicable to minimise the adverse consequences of such works or activities to passengers.

17.13 In the event of any unplanned works or activities (including Maintenance Services) to be carried out by the Infraco as a result of a system failure, breakdown or an emergency caused by a failure of the Infraco to comply with its obligations under this Agreements, the Infraco shall:

17.13.1 notify **tie** and the Operator as soon as possible of the nature of such works or activities and the likely disruption or restriction of the Transport Services;

17.13.2 take all reasonable steps to support **tie** in notifying passengers as soon as reasonably practicable of the nature of such works and activities and the likely disruption or restriction of the Transport Services; and

17.13.3 take all steps which are reasonably practicable to minimise the adverse consequences of such works and activities to passengers. Where **tie** considers that such works and activities will result in the Transport Services not being provided for any period, the Infraco shall take such steps that shall include support and, save in relation to any failure to provide the Tram Supply Obligations the Tram Maintenance Services, compensation to the Operator in providing an alternative means of transportation being in service as soon as reasonably practicable. For the purposes of this Clause 17.13.3, the Parties acknowledge that it will generally be reasonably practicable for the Operator to arrange for an alternative means of transportation to be in service within 90 minutes of becoming aware of the requirement for it.

DPOFA Changes

17.14 **tie** shall notify the Infraco of any proposed variation under the DPOFA which in **tie's** opinion (acting reasonably) may affect the Infraco's performance of its obligations or the exercise of its rights under this Agreement or increase the likelihood of a claim arising under Clause 17.33 and the Infraco shall respond with comments ("**DPOFA Change Response**") within 15 Business Days of being notified by **tie** of any proposed variation under DPOFA (a "**DPOFA Change**").

17.15 If in the DPOFA Change Response, Infraco have provided information in relation to or agreed with **tie's** assessment in relation to:

17.15.1 any adverse impact which the DPOFA Change will have on the Infraco Works or the ability of, or cost to the Infraco of performing its obligations under this Agreement, or the rights of Infraco under this Agreement or increase the likelihood of a claim arising under Clause 17.33; or

17.15.2 any valid reason why the Infraco would be entitled to refuse to implement any **tie** Change required as a result of the DPOFA Change in accordance with Clause 80.12

(being the "**DPOFA Adverse Impact**")

the Infraco shall provide **tie** and the Operator with a written report within 15 Business Days (or such longer period as the Parties acting reasonably agree) providing details of the DPOFA Adverse Impact and Infraco's proposals for avoiding or mitigating the DPOFA Adverse

Impact and any **tie** Changes which, in the opinion of the Infraco, acting reasonably, will be required as a result of the DPOFA Change ("**DPOFA Change Report**").

17.16 **tie** shall review the DPOFA Change Report promptly and if **tie**, acting reasonably, is satisfied that a modification to the proposed DPOFA Change is required to address any issue arising from the DPOFA Change Report, **tie** shall instruct such modification under the change provisions of the DPOFA and any change required to the Infraco Works shall be a Mandatory **tie** Change pursuant to Clause 80 (**tie Changes**).

17.17 Failure by the Infraco to respond as stipulated in Clauses 80 and 17.15 shall be a bar to any claim for relief or compensation under Clause 80 (**tie Changes**) or otherwise. Infraco shall not be entitled to refuse to perform its obligations which are affected by the DPOFA Change unless so entitled pursuant to Clause 80.12.

Safety

17.18

17.18.1 The Infraco shall provide a permanent representative for the Project Safety Certification Committee who shall be responsible for the Infraco's mandatory participation in and technical contribution to the Project Safety Certification Committee's output and the discharge of its responsibilities.

17.18.2 The Infraco's obligations with regard to safety shall encompass at a minimum:

17.18.2.1 participation on a compulsory basis in all liaison meetings with the Independent Competent Person, HMRI and Emergency Services;

17.18.2.2 the development and implementation of a safety management system (the "**Infraco Safety Management System**") which shall address without limitation:

- (i) Infraco staff competency and its continual assessment;
- (ii) training on all safety related issues;
- (iii) safety procedures;
- (iv) record keeping and audit;
- (v) certification of materials and equipment;

- (vi) frequency and mode of audit by **tie** of the Infraco Safety Management System;
- (vii) incident response and management; and
- (viii) continual improvement and best practice.

17.19 **tie** and the Operator shall be entitled to review the Infraco Safety Management System (and its implementation) at any time upon notice which is appropriate in the circumstances and in any case within no more than 3 days. For the avoidance of doubt, **tie** and the Operator shall be entitled to immediate access upon the occurrence of an incident.

17.20 It shall be the responsibility of the Infraco to undertake and complete verification, through agreed procedure, of the safety and service readiness of the Edinburgh Tram Network prior to service start-up every morning no later than one hour (or such other time as agreed between the Parties) prior to Transport Services commencing each day and to certify this status to **tie** and to the Operator in an agreed form.

17.21 In the event that the Operator can demonstrate to the Infraco that the Edinburgh Tram Network is not ready for service start up in accordance with Clause 17.19 or such other process as is agreed between the Parties, the Infraco shall notify **tie** and the Infraco shall rectify any deficiency in accordance with this Agreement which is preventing the commencement of Transport Services in accordance with this Agreement.

17.22 The Infraco shall liaise effectively with the Operator in co-ordination of health and safety issues at the Depot in accordance with the Depot Licence.

Maintenance

17.23 The Infraco shall give the Operator and **tie** a minimum of one month's prior notice in outline of any planned maintenance forming part of the Maintenance Services to be carried out on any part of the Edinburgh Tram Network, such initial notice to be followed by at least 14 days notice in detail and, in relation to Infrastructure Maintenance Services, 7 days notice of individual method statements relating to such works or activities anywhere on the Edinburgh Tram Network.

17.24 Not less than 6 months prior to the Planned Service Commencement Date, the Infraco shall provide **tie** and the Operator with a combined maintenance plan demonstrating how the effects of planned maintenance on the provision of Transport Services in accordance with Timetable shall be minimised, based upon the Maintenance Plan and, subject to a copy of the Operator

Maintenance Plan being supplied to the Infraco not less than 12 months prior to the Planned Service Commencement Date, the Operator Maintenance Plan. **tie** shall review such combined maintenance plan in accordance with Schedule Part 14 (*Review Procedure and Design Management Plan*).

Operational Interface and Operator Mobilisation

17.25 Following the Service Commencement Date subject to Clause 17.20, the day-to-day operation of the Edinburgh Tram Network shall be the responsibility of the Operator. To enable the efficient operation of the Edinburgh Tram Network, the Infraco shall provide technical advice where practicable to **tie** and to the Operator during normal working hours regarding the operational deployment and integration of the various components of the Edinburgh Tram Network which relate to the scope of work under this Agreement and any other non-confidential and non-financial information regarding their design, construction, standards, integration, operation and maintenance which the Operator and **tie** may reasonably request provided such request does not adversely impact on the delivery of the Infraco Works.

Facilities and Access

17.26 The Infraco shall in so far as reasonably practicable at all times provide to the Operator and **tie** such access to the places where the Infraco Works are being performed and the Tram testing facilities during the construction of the Infraco Works as the Operator may reasonably require and in accordance with Clause 17.27.

17.27 The Infraco acknowledges that the Operator and **tie** will require access to the Site, the places where the Infraco Works are being performed and the Tram testing facilities in order to prepare for the operation of the Edinburgh Tram Network . The Infraco agrees:

17.27.1 that it will co-operate with the Operator and **tie** and plan to avoid any interference with mobilisation by the Operator; and

17.27.2 that the presence of the Operator and **tie** on at such locations will not in any circumstances be treated as partial completion of the Infraco Works;

provided that such access shall not disrupt or interfere with the performance by Infraco or any Infraco Party of the Infraco Works and **tie** shall, and shall procure that the Operator shall, during any period when it or they have access to such locations, the Infraco Works and the Tram testing facilities, comply with all rules and regulations applicable to working at those premises for the safety of persons and convenience of the public.

17.28 Pursuant to Clause 17.23 **tie** agrees that where any damage is caused to the Infraco Works by the Operator or by **tie**, the repair of such damage shall not be part of the Infraco's obligations under this Agreement unless such damage results from fair wear and tear or from operations by the Operator or **tie** in accordance with the Operations and Maintenance Manual but where **tie** requires the Infraco to repair such damage, it will issue a **tie** Notice of Change in respect of such repair works.

System Acceptance

17.29 The Infraco shall ensure that at all times it works closely and effectively with the Operator in the performance by the Operator of the Operator's obligations and the performance by the Infraco of the Infraco's obligations pursuant to the Systems Acceptance Tests and the associated obligations on testing and commissioning set out in Schedule Part 2 (*Employer's Requirements*).

17.30 In the event that as a direct consequence of an Operator Event, the Infraco is unable to progress or is hindered in the performance of its obligations pursuant to the Systems Acceptance Tests and the associated obligations on testing and commissioning set out in Schedule Part 2 (*Employer's Requirements*), it shall notify **tie** and the Operator in writing as soon as practicable stating the reasons and the action required in order to remedy the situation.

Partnering

17.31 The Infraco shall use reasonable endeavours to work collaboratively with the Operator and **tie** shall procure that the Operator shall use reasonable endeavours to work collaboratively with the Infraco at all times in order to:

17.31.1 maximise productivity during the Infraco Works and minimise disruption for the public and third parties;

17.31.2 ensure the effective discharge of the Infraco's obligation to deliver complete system integration throughout the Infraco Works in accordance with Clause 8 (*System Integration*);

17.31.3 satisfy the levels of technical systems availability required following the Service Commencement Date to support the provision of the Transport Services

17.31.4 minimise and give best advance notice to one another and to **tie** of any interruption to Transport Services caused by any Operator Event, DPOFA Infraco Event or Infraco Default, maintenance (planned or unplanned) or third party incident;

- 17.31.5 not hinder proper performance of the Project Development Services, the Project Operations and all obligations under this Agreement;
- 17.31.6 mutually support adherence to the Programme and all related timelines and programmes;
- 17.31.7 report promptly to one another and to **tie** any proposed change permitted under the DPOFA (in the case of the Operator) or this Agreement (in the case of the Infraco), which is likely to or will have a material impact on the performance of any obligations owed to **tie** or the exercise of rights under this Agreement and/or the DPOFA (as appropriate) by the Infraco and/or the Operator during design, construction, operation or maintenance of the Edinburgh Tram Network, and to jointly inform **tie** regarding measures proposed to avoid or mitigate such impact; and
- 17.31.8 to use reasonable endeavours to agree and implement whenever appropriate measures to minimise the likelihood of disputes or claims arising from or in connection with the interface between the Operator's rights and obligations and the Infraco's rights and obligations pursuant to DPOFA and this Agreement respectively.
- 17.32 Subject to the provisions of Clauses 17.30, 77.3, 77.7 and 77.8, in the event that a DPOFA Infraco Event occurs, Infraco shall indemnify **tie** against any costs, claims, losses, liabilities or other expenditure (save to the extent incurred as a result of any act or omission of the Tram Supplier or Tram Maintainer in which case **tie's** rights under Clause 77 shall apply) ("**DPOFA Claims**") which **tie** is required to pay to the Operator pursuant to DPOFA, save that any element of DPOFA Claim arising by reason of any delay in the performance of the Infraco's obligations under this Agreement prior to Service Commencement Date shall be recovered by **tie** solely through the operation of Clause 62 (*Liquidated and Ascertained Damages*). Infraco shall not be liable indemnify **tie** against any DPOFA Claims to the extent the DPOFA Infraco Event giving rise to the DPOFA Claims has arisen as a result of an amendment to DPOFA not notified to Infraco in accordance with Clause 17.14.
- 17.33 Where, in this Agreement, the Infraco is required to liaise, co-operate, work with, meet or otherwise interface with the Operator, **tie** shall procure that the Operator shall liaise, co-operate, work with, meet or otherwise interface with the Infraco to enable the Infraco to comply with such obligations in relation to the Operator under this Agreement.
- 17.34 Where the Operator or **tie** have predominantly caused or materially contributed to the occurrence, effect or duration of a DPOFA Infraco Event the amount payable by Infraco as a result of a DPOFA Claim shall be reduced to the extent of such causation or contribution.

17.35 Where, in relation to the Tram Supply Agreement and as directed by the Infraco, the Tram Supplier is obliged to accept and act upon reasonable instructions from the Operator in respect of specific contractual rights including safety management, possession co-ordination and maintenance interaction, such instructions are likely to impede or delay the execution of works by the Tram Supplier then, on the Infraco's request, the Operator shall be required by **tie** under DPOFA to confirm them in writing to the Tram Supplier. In so far as the written instructions do not arise from an act or omission under this Agreement or under the Tram Supply Agreement or procedures by the Tram Supplier, the Infraco or the Tram Supplier (as relevant) shall not be liable for such non-execution or delay and liquidated damages shall not be applied. If the instructions or actions require the addition of works or duties or deliveries not included in the scope of the Tram Supply Agreement and where the Tram Supplier claims reasonable, substantiated economic compensation for such works from the Infraco in accordance with Clause 49 (*Compensation Event*) of the Tram Supply Agreement, this shall be a Compensation Event under this Agreement.

PART 5 - LAND ISSUES, CONSENTS AND SITE

18. LAND CONSENTS, PERMANENT LAND AND TEMPORARY SITES

18.1 tie:

18.1.1 warrants to the Infraco that it will grant access to the Permanent Land and Temporary Sites and provide Infraco with all necessary Land Consents in each case accordance with this Clause 18.

18.1.2 hereby grants a non-exclusive licence to the Infraco to enter and remain upon the Permanent Land for the duration of the Term and an exclusive licence to the Infraco to enter and remain upon the Designated Working Area for the duration of the time required (pursuant to Schedule Part 15 (*Programme*)) for completion of the Infraco Works to be executed on such Designated Working Area; and

18.1.3 shall provide the Infraco with all necessary Land Consents in relation to the Permanent Land for the duration of time required (pursuant to Schedule Part 15 (*Programme*)),

in either case only in so far as the same is required for the purposes of carrying out the Infraco Works. For the avoidance of doubt, the rights provided to the Infraco pursuant to this Clause 18.1 shall not confer nor be deemed to confer upon the Infraco a right of ownership, a lease or any other interest in the Permanent Land other than a right of access, egress or occupancy as is required for the purposes of carrying out the Infraco Works.

- 18.2 Subject to any rights to enter upon any Temporary Sites pursuant to Clauses 18.4 to 18.10 (inclusive) and any requirement to carry out Accommodation Works outwith the Permanent Land, the Infraco shall not design or construct any part of the Edinburgh Tram Network upon or otherwise encroach upon any land outwith the Permanent Land for the purposes of carrying out the Infraco Works without the prior written consent of **tie**.
- 18.3 In relation to the parts of the Permanent Land referred to in schedule 6 to each of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006, the Infraco shall use such sites for the purposes set out in relation thereto in the said schedule 6.
- 18.4 Where the Infraco requires access to any Temporary Site for the purposes of carrying out the Infraco Works, it shall give **tie** not less than 40 days notice and at the same time as providing such notice, shall be required to provide to **tie**:
- 18.4.1 an estimate as to the amount of time that the Infraco will occupy such site; and
- 18.4.2 a breakdown of the use of such site in the form of a detailed programme of works.
- 18.5 **tie** shall, within 40 days of the notice issued by the Infraco pursuant to Clause 18.4 (or such longer period as may be referred to in such notice) provide access to the Infraco to the relevant Temporary Site for the purpose referred to in Clause 18.6, including the provision of any necessary Land Consents in relation thereto.
- 18.6 Without prejudice to any other term of this Agreement, the Infraco shall comply with the terms of schedule 7 of each of the Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006 in relation to the purpose for which possession of any Temporary Site can be taken in accordance with Clauses 18.4 to 18.10 (inclusive).
- 18.7 The Infraco's possession of any Temporary Site pursuant to Clauses 18.4 to 18.10 (inclusive) shall be subject to an overriding obligation to minimise the period of any such possession.
- 18.8 Without prejudice to Clause 18.7, the Infraco shall not, without the prior written agreement of **tie**, remain in possession of any Temporary Site after the end of the period of 28 days following completion of the Infraco Works to that Temporary Site save where the Infraco has established a site office on such Temporary Site, when the period shall be 3 months.
- 18.9 The Infraco shall provide **tie** with as much notice as is reasonably practicable of its vacation of any Temporary Site in relation to which it has taken possession.

18.10 Before giving up possession of any Temporary Site, the Infraco shall remove all temporary works and restore the land to the reasonable satisfaction of the land owner (as notified to the Infraco by **tie**), provided that the Infraco shall not be required to replace a building removed on any Temporary Site in accordance with the Tram Legislation. For the avoidance of doubt, the Infraco shall:

18.10.1 not demolish a building or any part thereof without the consent of **tie**; and

18.10.2 provide **tie** with sufficient evidence (including a detailed record of the condition of the land both before and after the occupation of the Temporary Site) to show that it has complied with its restoration obligations under this Clause 18.10.

18.11 Without prejudice to the rights of access to be granted to Infraco by **tie** pursuant to Clause 18.1 and 18.5, Infraco shall comply with the requirements of Clause 18.17A and Schedule Part 13 (*Third Party Agreements*) when it is in occupation of the Permanent Land or any Temporary Site pursuant to this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*).

18.12 For the purposes of performing the Maintenance Services, the Infraco shall provide **tie** and any relevant land owner with not less than 40 days notice of its intention to enter upon and take temporary possession of any land outwith the Permanent Land, provided that, the Infraco may not be entitled to request any land which is referred to in Clause 18.14 below. The requirement to give prior written notice set out in this Clause 18.12 shall not apply where any building fixing agreement entered into pursuant to this Agreement contains a right for Infraco or any Infraco Party to enter onto any land for the purposes of performing the Maintenance Services.

18.13 On the expiry of the 40 days notice referred to in Clause 18.12 above (or such longer notice period as is provided by the Infraco in the said notice), **tie** shall procure that the Infraco shall be entitled to take possession of such land in accordance with section 27(1) of either the Edinburgh Tram (Line One) Act 2006 or the Edinburgh Tram (Line Two) Act 2006 (as appropriate).

18.14 For the avoidance of doubt, the Infraco shall not be entitled to take possession of any land pursuant to Clause 18.12 where such land:

18.14.1 is more than 20 metres from any Infraco Works;

18.14.2 is not reasonably required for the purposes of, or in connection with the Maintenance Services;

- 18.14.3 involves taking possession of any house or garden belonging to a house; or
- 18.14.4 involves taking possession of any building (other than a house) if it is for the time being occupied.
- 18.15 Without prejudice to the obligations of **tie** to provide access to the Permanent Land or any Temporary Site to the extent set out in this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*), the Infraco shall notify **tie** as soon as reasonably practicable on becoming aware of any Land Consents which may be required in order to carry out and complete the Infraco Works. For the avoidance of doubt, the Infraco shall be responsible for obtaining, at its own cost, any Land Consents required outwith the Permanent Land or Temporary Sites as aforesaid and, **tie** shall use reasonable endeavours to assist the Infraco to obtain such Land Consents provided that the costs of such assistance shall be paid by the Infraco to **tie**.
- 18.16 As required by **tie**, the Infraco shall use reasonable endeavours to assist **tie** to obtain any Land Consents, any amendments to existing Land Consents and any new Land Consents in respect of the Permanent Land and the Temporary Sites, including providing works programmes, providing any relevant information, and notifying land owners. Any reasonable costs associated with assisting **tie** shall be paid by **tie** to the Infraco.
- 18.17 The Infraco warrants that it shall not breach the terms of any Land Consent in respect of the Permanent Land or any Temporary Site with which it is issued by **tie** in accordance with this Agreement. If the Infraco breaches any term of any Land Consent, the Infraco shall be required to seek any amendment to the existing Land Consent or new Land Consent which may be required in order to carry out and complete the relevant Infraco Works. In the circumstances where a breach of the Land Consent has arisen because of the breach of this Agreement by the Infraco or a wilful act or wilful omission by the Infraco, the Infraco shall not be entitled to apply for an extension of time or any payment to the extent that such extension of time or payment is required as a direct result of the breach of the Land Consent caused by the Infraco or any Infraco Party. If the Infraco does not obtain the required amendment or new Land Consent, **tie** shall be entitled to recover the costs from the Infraco which are associated with **tie** obtaining such amendment or new Land Consent.
- 18.17A Without prejudice to the rights of access to be granted to Infraco by **tie** pursuant to Clause 18.1 and 18.5, the Infraco shall take all necessary steps in delivering the Infraco Works to ensure that neither **tie** nor CEC will be put in breach of their obligations to third parties pursuant to the third party undertakings and commitments contained in Schedule Part 13 Section B. If, in complying with this obligation:

- 18.17A.1 the Infraco incurs costs or suffers delay as a result of adverse impact on the Programme or unreasonable constraints on its construction methodology due to constraints or requirements in such third party undertakings and commitments which are materially different to the obligations under this Agreement and which could not reasonably have been foreseen by an experienced transport infrastructure contractor executing works in the operating environment of a major UK city;
- 18.17A.2 the Infraco is required to undertake minor works;
- 18.17A.3 works are required which are outwith the Base Date Design Information contained in Schedule Part 4 (*Pricing*);

then the circumstances under 18.17A.1 shall be a Compensation Event, any minor works required under 18.17A.2 shall be deemed to have been instructed by **tie** pursuant to Clause 83 (*Accommodation Works*) and 18.17A.3 shall be dealt with as a **tie** Change.

18.17B The Infraco undertakes to comply with its obligations in relation to Schedule Part 13 Section A (*Third Party Agreements*) and shall not cause **tie** or CEC to be in breach of such agreements (or to be unable to exercise their rights pursuant thereto) by reason of its failure to perform such obligations.

18.17C Before commencing any works pursuant to Clause 18.17A.3, the Infraco shall notify **tie** of its intention to execute such works. **tie** shall respond to such notification within 10 Business Days. If **tie** instructs such works in its response, such instruction shall constitute a Mandatory **tie** Change for the carrying out of such works. If **tie** does not instruct such **tie** Change in its response, the Infraco shall not carry out such works and shall not be in breach of any of its obligations under this Agreement as a result of not carrying out the works.

18.17D In the event that the Infraco considers and demonstrates to **tie**, acting reasonably, that it is impossible and not just more expensive to carry out any part of the Infraco Works without breaching its obligations to comply with the requirements of Third Party Obligations or its other obligations under Clause 18.17A, **tie** shall endeavour to obtain an appropriate amendment or deletion of the relevant third party requirements or constraint to remove such impossibility provided that Infraco has submitted supporting information on what measures it will use to minimise the effect of the Infraco Works on the third party in question and Infraco will not be required to continue to comply with such third party requirements. If **tie** cannot obtain the relevant amendment or deletion, **tie** shall instruct the Infraco pursuant to a **tie** Change.

- 18.18 If the Infraco suffers delay from failure on the part of **tie** to give possession or access in accordance with the terms of this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*), such failure shall be a Compensation Event and the terms of Clause 65 (*Compensation Events*) shall apply.
- 18.19 Subject to Clause 18.23 and Clause 83 the Infraco shall provide or acquire at its own cost any additional access, land, rights or facilities outside the Permanent Land and the Temporary Sites being provided by **tie** in accordance with this Clause 18 (*Land Consents, Permanent Land and Temporary Sites*) for the purposes of the Infraco Works.
- 18.20 If having used reasonable endeavours to obtain access to land, rights or facilities outside the Permanent Land and the Temporary Sites required to allow it to carry out any part of the Accommodation Works, Infraco is refused or is unreasonably delayed access (or such access having been granted is subsequently withdrawn) to such land, rights or facilities sufficient to allow completion of the Accommodation Works Infraco shall serve a notice on **tie** (an "Accommodation Works Notice") which shall contain the following information:
- 18.20.1 the land, rights or facilities to which Infraco has been unable to gain access;
- 18.20.2 the steps taken to gain such access to land, rights or facilities;
- 18.20.3 the circumstances in which access has been withdrawn or denied; and
- 18.20.4 details of any other parts of the Infraco Works which can not be carried out in accordance with the Programme if the Accommodation Works are not completed.
- 18.21 Within 15 Business Days of receipt of an Accommodation Works Notice, **tie** may notify Infraco that it disputes the circumstances to which Clause 18.20 applied have occurred. If such a notice is served by **tie**, the Parties shall use reasonable endeavours to resolve such dispute within 10 Business Days of the service of such a notice, failing which either Party will be entitled to refer the matter for determination to the Dispute Resolution Procedure.
- 18.22 If **tie** does not dispute the Accommodation Works Notice pursuant to Clause 18.21, any delay or failure to obtain access to land, rights or facilities to which Clause 18.20 applies shall be a Compensation Event and the terms of Clause 65 (*Compensation Events*) shall apply and **tie's** Representative shall issue further instructions regarding the Accommodation Works Notice given pursuant to Clause 83 (*Accommodation Works Changes*).

19. CONSENTS AND TRAFFIC REGULATION ORDERS

19.1 Subject to Clause 19.2, **tie** shall:

19.1.1 obtain and maintain in effect all Temporary Traffic Regulation Orders ("**TTROs**") required for the execution of the Infraco Works prior to Service Commencement Date and all Traffic Regulation Orders with permanent effect required for the operation and maintenance of the Edinburgh Tram Network and shall call-off under existing **TTROs**, all at such times and for such periods as may be required to allow Infraco to carry out and complete the Infraco Works in accordance with the Programme and On Street Construction Works Methodology; and

19.1.2 obtain and maintain in effect all other Consents which are **tie** Consents.

19.2 The Infraco shall provide all supporting information necessary to enable **tie** to obtain a **TTRO** or call-off under an existing **TTRO** and all other reasonably necessary assistance and support to **tie** for the purposes of **tie's** activities pursuant Clause 19.1 in accordance with the Employer's Requirements.

In the event that the failure of the Infraco to provide assistance timeously and in accordance with the Employer's Requirements causes a delay in **tie** obtaining the relevant Temporary Traffic Regulation Order or Traffic Regulation Order, Infraco shall not be entitled to any relief or additional payment in respect of resultant delay or cost that Infraco or any Infraco Party may suffer as a result of the delay in obtaining the **TRO** or **TTRO** except where such failure arose as a result of a Notified Departure, **tie** Change or Compensation Event.

19.3 The Infraco shall obtain and maintain all Design Stage Consents, Construction and Maintenance Stage Consents and Temporary Traffic Regulation Orders (required after the Service Commencement Date) required for the performance and completion of the Infraco Works.

19.4 **tie** shall provide all reasonable assistance to the Infraco and Infraco Parties in obtaining and maintaining Consents for which the Infraco and/or the Infraco Parties are responsible. Where Infraco notifies **tie** in writing that it or the Infraco Parties are encountering difficulty in obtaining or maintaining a Consent, **tie** shall, where appropriate, provide support to the Infraco and/or the Infraco Parties by making representations to the relevant Approval Body, provided always that the Infraco (or the relevant Infraco Party) has submitted all required information relevant to the process of seeking the Consent in compliance with the Approval Body's timescales and requirements.

19.5 Infraco shall obtain and maintain in full force and effect the Design Stage Consents and the Construction and Maintenance Stage Consents.

19.5.1 The obtaining and maintaining of Design Stage Consents form part of the scope of services provided by the SDS Provider to the Infraco, save that where Infraco has elected to undertake designs itself or is procuring others to undertake such designs (that is to say Infraco Design), in which case Infraco is responsible for supporting the SDS Provider with relevant technical expertise in accordance with the SDS Agreement in order for SDS Provider to obtain the Design Stage Consents that relate to these elements of the design for the Infraco Works.

19.5.2 Subject to Clause 19.6 below, failure to obtain a Design Stage Consent (including Additional Consents) from the relevant Approval Body in respect of a design which the SDS Provider is responsible for preparing by the date on which it is shown as required in the Consents Programme included in the SDS Novation Agreement and/or Schedule Part 15 (*Programme*), shall be a Compensation Event.

19.5.3 The Infraco shall itself be responsible for obtaining the Construction and Maintenance Stage Consents.

19.6 Clause 19.5.2 shall apply following the inability of the SDS Provider to obtain (or maintain) a Design Stage Consent for which it is responsible and in accordance with the Consents Programme contained in the SDS Novation Agreement, provided that:

19.6.1 the Infraco:

- (i) has informed **tie** of the reasons (if any) given by the relevant Approval Body for declining to issue or renew the Design Stage Consent by the programmed date and has provided appropriate supporting documentation to **tie**;
- (ii) has informed **tie** as soon as practicable after it became aware that the Design Stage Consent may not be obtained or renewed by the programmed date;
- (iii) has used reasonable endeavours to afford **tie** the opportunity to meet with the relevant Approval Body within 3 Business Days of notification pursuant to Clause 19.6.1(i) and (ii) with a view to resolving the situation and supported **tie** by its attendance at such meeting, accompanied by the SDS Provider;
- (iv) has acted in order to mitigate the impact of the failure to obtain or renew the Consent;

- 19.6.2 the Infraco has taken all reasonable steps to manage the SDS Provider to ensure the SDS Provider obtains or renews the Design Stage Consents and ensures timely provision of adequate required information to the relevant Approval Body in accordance with the Consents Programme, the Design Delivery Programme, the agreed requirements of the Approval Body and the Design Management Plan as set out in Schedule Part 14 (*Review Procedure and Design Management Plan*);
- 19.6.3 where the Approval Body is CEC, the inability to obtain or renew the Consent is not the result of the Infraco reprogramming the Infraco Works or instructing the SDS Provider to reprioritise the Design Delivery Programme (save where such reprogramming or reprioritisation is the direct result of a **tie** Change, a Relief Event, a default by **tie** or a Compensation Event or has been agreed pursuant to Clause 19.16), such that CEC has insufficient time or information in which to respond to an altered timescale;
- 19.6.4 where the Approval Body is CEC and where CEC has failed to respond and comply with the timescale requirements set out in the Consents Programme, such failure has not been caused by incomplete or late submissions by the SDS Provider or the Infraco as required by the Consents Programme, Schedule Part 14 (*Review Procedure and Design Management Plan*), SDS Agreement (other than as a result of a Compensation Event, Relief Event, default by **tie** or **tie** Change);
- 19.6.5 the failure to obtain or renew the Consent is not a consequence of a failure of the SDS Provider to perform its obligations under the SDS Agreement in terms of the quality or content of the relevant design submissions and as required pursuant to the Consents Programme contained in Schedule Part 15 (*Programme*), Schedule Part 14 (*Review Procedure and Design Management Plan*) and, where relevant, Clause 10 (*Design Development and Finalisation*); and
- 19.6.6 the failure to obtain or renew a Design Stage Consent for Infraco's Design is not a consequence of a failure of the Infraco to provide all the necessary information timeously in accordance with Schedule Part 14 (*Review Procedure and Design Management Plan*) and with the Programme or a failure of the Infraco to provide adequate technical support to the SDS Provider pursuant to Clause 19.5.1 or a consequence of the content or quality of the Infraco Design but not, for avoidance of doubt, on the grounds of design principle, scope, form or specification where such design meets the Employer's Requirements and the Infraco Proposals.

- 19.7 Subject to Clause 19.6, Clause 19.5.2 shall apply where, and to the extent that, a Consent is sought and the relevant Approvals Body
- 19.7.1 requires changes to design which could not reasonably have been anticipated from the previous formal or informal consultations or communications with the Approvals Body; or
- 19.7.2 does not deliver the Consent within the period stated in the Consents Programme or such Consents Programme updated in accordance with these terms.
- 19.8 Clauses 19.6.3 and 19.6.4 shall not apply to a Consent where CEC is the Approval Body and where CEC, acting reasonably, has agreed in writing to a proposal from Infraco to changes in the sequencing, packaging, timescales, reprogramming or reprioritisation implemented by Infraco from the Consents Programme, the Design Delivery Programme and the Design Management Plan as set out in and the Schedule Part 14 (*Review Procedure and Design Management Plan*), provided that Infraco has provided reasonable advance notice to **tie** and to the Approvals Body including full details of the proposed changes.
- 19.9 Responsibility for obtaining, maintaining or renewing any Consent which is not specified in the Consents Programme ("**Additional Consent**") shall be allocated as follows:
- 19.9.1 where the Additional Consent is a Design Stage Consent, it shall be the responsibility of the Infraco to manage the SDS Provider in obtaining the Consent (to the extent that such Consent is the responsibility of the SDS Provider to obtain under the SDS Agreement), save for Consents which relate to design prepared by the Infraco itself in which case the Infraco shall be responsible for the Consent which, if appropriate, shall be dealt with as an Infraco Change;
- 19.9.2 where the Additional Consent is a Construction and Maintenance Stage Consent, it shall be the Infraco's responsibility and, if relevant, shall be dealt with as an Infraco Change;
- 19.9.3 where the Additional Consent is a **tie** Consent, **tie** shall be responsible for obtaining, maintaining or renewing it.
- 19.9.4 Where the Additional Consent is not a Design Stage Consent or a Construction and Maintenance Stage Consent and **tie** requires Infraco to obtain it, then **tie** shall instruct Infraco and such instruction shall be a **tie** Change.

The Parties shall provide all reasonable support to one another in relation to obtaining and maintaining such Additional Consents and each shall bear its own costs in obtaining any Additional Consent, save where the Additional Consent is required as a result of a **tie** Change, in which case the costs related to obtaining the Additional Consent shall be included in the valuation pursuant to Clause 80 (**tie** Change).

- 19.10 **tie** shall obtain the Network Rail Possessions required by Infraco to carry out and complete the Infraco Works in accordance with the Programme. The Infraco shall prepare and provide to **tie** in accordance with the Programme all required technical and design documentation necessary to enable **tie** to apply to Network Rail to obtain Consents for the booking or rebooking of possessions (which have been obtained by **tie** based on the Infraco Proposals) in accordance with the Programme. **tie** shall be responsible for the charge payable to Network Rail for possessions, save where new possessions are needed due to the Infraco's default or delay (save where such default or delay has been caused by a default by **tie**, a Compensation Event, Relief Event or a **tie** Change) in which event any associated charges shall be paid by the Infraco. Cancellation or alteration by Network Rail of possession dates, timings or duration with insufficient notice or replacement possessions shall be a Compensation Event.
- 19.11 The Infraco shall update the Consents Programme by each Reporting Period End Date showing progress and any Additional Consents to be obtained. **tie** shall be entitled to request information in relation to the progress of the application for any Design Stage and Construction and Maintenance Stage Consent and the Consent itself and the Infraco shall provide the same at no cost to **tie**.
- 19.12 The Infraco shall notify any relevant Approval Bodies, with a copy to **tie**, of the dates and times when the Infraco will require their services on the Site and shall be responsible for the co-ordination of their works if necessary with the remainder of the Infraco Works.
- 19.13 Where **tie's** authorisation or completion of documentation in respect of compliance with any Law is required, the Infraco shall furnish the relevant documentation to **tie** and, where possible, permit **tie** a period of 10 Business Days to authorise or complete it.
- 19.14 Except where otherwise provided in this Agreement and except in respect of **tie** Consents, the Infraco shall, or procure that the relevant Infraco Party shall, give all notices and pay all fees required to be given or paid in connection with the procurement of any Consent.
- 19.15 Without prejudice to the Infraco's obligations and rights under Clauses 18, 20, 32.1 and 32.2 and subject to **tie's** obligations to provide Land Consents in relation to the Permanent Land and the Temporary Sites pursuant to Clauses 18.1 and 18.5 and **tie's** obligations pursuant to

this Clause 19, if the carrying out of the Infraco Works or the remedying of any defects therein is likely to necessitate any interference with the rights of adjoining or neighbouring landowners, tenants or occupiers, then the Infraco shall use reasonable endeavours to obtain the prior written agreement of such landowners, tenants and/or occupiers on terms and conditions acceptable to the Infraco, acting reasonably. **tie** shall provide such reasonable assistance as requested by the Infraco in obtaining any such agreement. The Infraco shall comply with any conditions contained in any such agreement.

- 19.16 The Infraco may, upon reasonable notice to **tie**, request a change to the Consents Programme, in order to re-sequence or re-prioritise submissions in order to preserve the Programme (or to mitigate adverse impact upon it). In the event that the Infraco can demonstrate to **tie**, acting reasonably, that the change requested is necessary to prevent or mitigate the effect of a **tie** Change, a Relief Event, a Compensation Event or a Notified Departure or that such re-sequencing or re-prioritising does not create an increase or change in CEC's resourcing requirement or its work load per unit time in processing the relevant submissions, then **tie** shall approve such change within a timescale that is reasonable in the circumstances.
- 19.17 If having used reasonable endeavours, having acted in accordance with Good Industry Practice in relation to any construction methodology relevant to the granting of a Construction and Maintenance Stage Consent and having provided all necessary information required to obtain such Construction and Maintenance Stage Consent, Infraco is refused such Construction and Maintenance Stage Consent or the granting of such Construction and Maintenance Stage Consent is unreasonably delayed, then such refusal or delay shall be a Compensation Event to which Clause 65 (Compensation Event) shall apply.
- 19.18 Where the Infraco obtain an APA Consent, the Infraco shall forward two copies of such APA Consent to **tie**.
- 19.19 The Infraco shall not be entitled to any relief or compensation and the provisions of Clause 65 (Compensation Events) shall not apply in the event that Infraco Design is (i) not submitted to the SDS Provider in accordance with the Consents Programme and Schedule Part 14 (*Review Procedure and Design Management Plan*); or (ii) is rejected by the Approvals Body on grounds of content or quality but not, for avoidance of doubt, on the grounds of design principle, scope, form or specification where such design meets the Employer's Requirements and the Infraco Proposals.

20. BUILDING FIXING AGREEMENTS

- 20.1 The Infraco shall submit Proposals to **tie** at least 6 months (other than any revised Proposal referred to in Clause 20.3 in which case such Proposals shall be submitted to allow sufficient time for **tie** acting expeditiously to review and agree in order to comply with the Programme) prior to the date on which the Infraco proposes to install, maintain, modify or replace any relevant supporting infrastructure in order to comply with the Programme. The Infraco shall, prior to taking any action under Clause 20.4 or otherwise in relation to the installation, maintenance, modification or replacement of any relevant infrastructure, obtain **tie's** consent to the Proposals referred to in this Clause 20.1, which consent shall not be unreasonably withheld or delayed provided that if **tie** unreasonably withholds or delays such consent the Infraco shall be entitled to refer the matter to the Dispute Resolution Procedure.
- 20.2 Concurrently with the action under Clause 20.1 and subject to Clause 19 (*Consents and Traffic Regulation Orders*) the Infraco shall obtain all necessary Consents or approvals from the relevant planning authority for the installation of temporary poles as an alternative for every proposed building fixing, in order that Clause 20.9.1.2 can be implemented forthwith on said clause being utilised.
- 20.3 In the event that **tie** do not consent to the Proposals referred to in Clause 20.1, the Infraco shall submit revised Proposals to **tie** to install, maintain, modify or replace any relevant supporting infrastructure, in order to obtain **tie's** consent in accordance with Clause 20.1, in order to comply with the Programme.
- 20.4 In the event that **tie** gives its consent to the Proposals referred to in Clause 20.1, the Infraco shall obtain all necessary Consents or approvals from the relevant planning authority in accordance with Clause 19 (*Consents and Traffic Regulation Orders*).
- 20.5 Where it is agreed, pursuant to Clause 20.3, that a building fixing is to be used, modified or replaced, the Infraco shall:
- 20.5.1 at its own cost:
- 20.5.1.1 provide **tie** with all information **tie** reasonably requires in order to secure the consent of the Heritable Proprietor and any other relevant party to allow the Infraco to carry out a survey in order to ascertain whether the relevant building may safely support the loadings which will be imposed upon it by the building fixings (or modification or replacement thereof) to be attached

thereto for as long as may be required in connection with the Edinburgh Tram Network; and

20.5.1.2 carry out the relevant survey

to allow **tie** and Infraco to enter into or vary a Building Fixing Agreement with the Heritable Proprietor under Clause 20.6; and

20.5.2 at its own cost, by the date falling 90 Business Days before the date on which the building fixing (or modification or replacement thereof) is scheduled to be affixed in accordance with the Programme, provide **tie** with all information **tie** reasonably requires in order to secure the agreement of the Heritable Proprietor to allow the siting, modification or replacement (as the case may be) of building fixings in such locations as the Infraco has set out in the Proposals issued pursuant to Clause 20.1, which agreement shall be documented and set out in the form of a Building Fixing Agreement or a variation to the existing Building Fixing Agreement or in the form of a new Building Fixing Agreement, subject to any amendments that **tie** may agree.

20.6 Subject to Clause 20.11, the Parties shall enter into any Building Fixing Agreement required pursuant to Clause 20.5.2 and **tie** shall procure that CEC and the Heritable Proprietor enter into such Building Fixing Agreement.

20.7 If any Heritable Proprietor withholds consent as envisaged by Clause 20.5, **tie** may, at its own cost, utilise the procedure for application to the Sheriff Court pursuant to section 16(4) of either the Edinburgh Tram (Line One) Act 2006 or the Edinburgh Tram (Line Two) Act 2006 (as appropriate).

20.8 Where **tie** decides to use the procedure referred to in Clause 20.7, the Infraco will use all reasonable endeavours to assist **tie** in such proceedings and **tie** shall reimburse Infraco for its reasonably and directly incurred costs in complying with this obligation.

20.9 Where **tie** uses the procedure referred to in Clause 20.7, and the application is rejected by the Sheriff Court, in whole or in part, or where **tie** determines that the rejection is likely to be upheld by the Sheriff Court, the Infraco, as directed by **tie** (acting reasonably) shall:

20.9.1.1 where in Infraco's opinion (acting reasonably) there is sufficient time within the construction programme, submit alternative plans for affixation of building fixings to alternative buildings at or around the same location; or

20.9.1.2 where in Infraco's opinion (acting reasonably) there is not sufficient time within the construction programme to propose such alternative plans, install a temporary pole in accordance with Clause 20.3 provided Infraco has obtained the application or applications required in order to obtain all necessary Consents or approvals from the relevant planning authority in accordance with Clause 20.4; or

20.9.1.3 submit alternative plans for affixation of building fixings to alternative buildings at or around the same location and install foundations for a temporary pole in accordance with Clause 20.3.

For the purposes of this Clause 20.9, **tie** will review such alternative plans and then issue a **tie** Change which shall be a Mandatory **tie** Change and the provisions of Clause 80 (**tie** Changes) shall apply.

20.10 If a relevant Heritable Proprietor or other appropriate party serves notice on the Infraco prior to the Expiry Date pursuant to Law or pursuant to a Repairs Notice or Redevelopment Notice under a Building Fixing Agreement (each as defined therein), requiring the temporary removal of a building fixing, the Infraco shall, subject to obtaining any necessary Consents for such removal and the erection and use of a temporary pole to support OLE at that location, remove the relevant building fixing or any part thereof as required by the terms of the relevant notice and shall be entitled to support the OLE at that location by erecting a temporary pole provided that as soon as reasonably practicable upon completion of the third party's works in respect of which the notice was served the Infraco shall:

20.10.1 remove any temporary pole; and

20.10.2 thereafter support the OLE forming part of the Edinburgh Tram Network at that location by way of a building fixing and not by any other method.

For the purposes of this Clause 20.10 such removal shall be a Mandatory **tie** Change and the provisions of Clause 80 (**tie** Changes) shall apply.

20.11 If having undertaken a survey pursuant to Clause 20.5.1.2, the Infraco is reasonably of the opinion that the building to which a building fixing is to be attached, modified or replaced cannot safely support the loadings which will be imposed upon it by such building fixing (or modification or replacement thereof) for as long as may be required in connection with the Edinburgh Tram Network and there is no alternative building at or around the same location to which the building fixing could reasonably be attached, and the Infraco submits to **tie** the survey and report upon which such opinion is based and either:

- 20.11.1 **tie** confirms in writing to the Infraco that it does not dispute such opinion; or
- 20.11.2 it is determined by the Dispute Resolution Procedure that such opinion is correct,
- then the Infraco shall be entitled to select the method for supporting the OLE at that location subject to obtaining all necessary Consents or approval from the relevant planning authority.
- 20.12 If, following compliance with Clauses 20.2, 20.4 and 20.9, having used reasonable endeavours (including application of Good Industry Practice) and provided all necessary information in a timely fashion required to obtain a Consent for any building fixings, the granting of such Consent to the Infraco is either refused or is delayed, such refusal or delay shall be a Compensation Event pursuant to Clause 65 (*Compensation Events*).
- 20.13 Clauses 20.7, 20.8, and 20.9 shall apply equally to circumstances where a Building Fixing Agreement is entered into but the successor to the whole or any part of the interest of the Heritable Proprietor in question refuses to honour the terms of the same or to enter into a fresh Building Fixing Agreement as to when a Heritable Proprietor withholds consent envisaged by Clause 20.5.
- 20.14 Subject to Clauses 77.2, 77.3, 77.7 and 77.8 (and where applicable Clauses 16.72 and 16.73), Infraco shall indemnify CEC during the Term in respect of any payments properly made pursuant to Clause 4 of any Building Fixing Agreement to the extent that liability to make such payment has arisen as a result of the Infraco's breach of its obligations under this Agreement.

21. NEW ROADS AND STREET WORKS ACT 1991 AND UTILITIES DIVERSION

- 21.1 In this Clause 21 (*New Roads and Street Works Act 1991 and Utilities Diversion*) "NRSWA" shall mean the New Roads and Street Works Act 1991.
- 21.2 NOT USED
- 21.3 All other expressions common to the Act and to this Clause 21 (*New Roads and Street Works Act 1991 and Utilities Diversion*) shall have the same meaning assigned to them by NRSWA.
- 21.4 The Infraco shall obtain any street works licence, road opening permits and any other consent, licence or permission (other than any Land Consents) under NRSWA that may be required for the carrying out of the Infraco Works on public roads and shall supply **tie** with copies thereof including details of any conditions or limitations imposed.

- 21.5 The Infraco shall be responsible for giving to any relevant utility any required notice (or advance notice where prescribed) of its proposal to commence any work. A copy of each such notice shall be given to **tie**. The Infraco shall use reasonable endeavours to assist **tie** and CEC in relation to the operation of NRSWA to recover contribution from, where appropriate, any relevant statutory undertaker.
- 21.6 If at any time during the Term works are carried out on the Permanent Land:
- 21.6.1 by or on behalf of a utility;
- 21.6.2 by the roads authority or any other third party authorised to carry out such works by the roads authority;
- except in any case where the works are executed by Infraco or an Infraco Party pursuant to Infraco's obligations under this Agreement ("**Third Party Works**");
- 21.6.3 Infraco shall not be in breach of and shall be relieved of its obligations under this Agreement to the extent such breach is caused by such Third Party Works; and
- 21.6.4 where such Third Party Works do not meet the standards set in the Employer's Requirements to which Infraco is obliged to maintain the Infraco Works in accordance with Clause 52, Infraco shall be relieved of its obligations to meet the standards set in Schedule Part 2 (*Employer's Requirements*) in relation to such Third Party Works and shall not be obliged to repair, reinstate or otherwise maintain such works except if otherwise instructed by **tie**, in which case such instruction will be a **tie** Change provided that the Infraco notifies **tie** promptly upon becoming aware of the occurrence of such Third Party Works.

22. ADVERSE PHYSICAL CONDITIONS AND ARTIFICIAL OBSTRUCTIONS

- 22.1 NOT USED
- 22.2 If at any time prior to 3 weeks before the commencement of engineering and construction activities (as shown in the Programme) on the affected area of the Site, the Infraco identifies or has reason to believe that there is unexploded ordnance, unidentified utility apparatus not listed in the Utilities Information or adverse physical conditions, ground conditions, artificial obstructions and/or land which is contaminated (other than land which is contaminated by the Infraco) and is not listed in the Ground Condition Information, the Infraco shall as early as practicable give written notice thereof to **tie**.

22.3 When giving written notice in accordance with Clause 22.2, the Infraco shall give details of (i) any anticipated effects of such unexploded ordnance, unidentified utility apparatus not listed in the Utilities Information, adverse physical conditions, ground condition, artificial obstructions or land which is contaminated, (ii) the measures it has taken, is taking or is proposing to take, (iii) the associated estimated costs, and (iv) the extent of the anticipated delay in or interference with the carrying out of the Infraco Works.

22.4 Following receipt of the notice by **tie** pursuant to Clause 22.2, **tie's** Representative shall:

22.4.1 require the Infraco to investigate and report upon the practicality, cost and timing of alternative measures which may be available; and/or

22.4.2 give written consent to the measures notified by the Infraco under Clause 22.3 with or without modification; and/or

22.4.3 give written instructions as to how the unexploded ordnance, utility apparatus which is not identified in Schedule Part 41 (*Ground Conditions and Utilities Information*), adverse physical conditions, ground condition, artificial obstructions or land which is contaminated are to be dealt with

and **tie's** Representative shall either order a suspension under Clause 87 (*Suspension of Work*) or instruct a **tie** Change in respect of the work to be carried out under this Clause 22.4 as a Mandatory **tie** Change under Clause 80 (**tie** Changes).

22.5 Notwithstanding the provisions of Clause 5 (*Provision and Interpretation of Information*), the discovery by Infraco at any time following the date 3 weeks before the commencement of engineering and construction activities (as stated in the Programme) on the affected area of the Site:

(a) unexploded ordnance;

(b) utility apparatus which is not identified in Schedule Part 41 (*Ground Conditions and Utilities Information*) and which could not have, or the nature of which could not have, reasonably been foreseen from the use of and interpolation from the Utilities Information; or

(c) adverse physical conditions, ground conditions, artificial obstructions and/or land which is contaminated, where such contamination has not been included in the Contract Price Analysis which could not have or the nature of which could not have reasonably been foreseen from the use of and interpolation from the Ground Condition Information;

shall be a Compensation Event in accordance with Clause 65 (*Compensation Events*) provided that:

22.5.1 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative 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 order to minimise the effects of the delay in, or if possible to avoid altogether any delay in, the progress by the Infraco of the Infraco Works; and

22.5.2 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative that the Infraco has used its reasonable endeavours to minimise and mitigate any extra costs incurred in relation to such adverse physical conditions, ground conditions, artificial obstructions, unexploded ordnance, unidentified utility apparatus or land which is contaminated; and

22.5.3 the Infraco demonstrates to the reasonable satisfaction of **tie's** Representative that any claim for additional time relates to timing implications which exceed those that are contained within the Programme in relation to the discovery of unexploded ordnance, unidentified utility apparatus, adverse physical conditions, ground conditions, artificial obstructions or land which is contaminated.

23. ACCESS TO THE INFRACO WORKS, THE SITE AND WORKSHOPS ETC.

23.1 **tie, tie's** Representative and any person authorised by **tie** or **tie's** Representative shall upon reasonable prior notice being given have access during normal working hours to the areas where the Infraco Works are being carried out and to the Site (so far as the same is under the Infraco's control) and to all workshops and places where work is being prepared or whence materials, manufactured articles, machinery and equipment (including the Trams) are being obtained for the Infraco Works (including the premises of any Infraco Party) and the Infraco shall afford every facility for and every assistance in obtaining such access or the right to such access provided that such access shall not disrupt or interfere with the performance by Infraco or any Infraco Party of the Infraco Works and **tie** shall, and shall procure that **tie's** Representative and any person authorised by **tie** or **tie's** Representative shall, during any period when it or they have access to the Site, the Infraco Works and the Tram testing facilities, comply with all rules and regulations applicable to working at those premises for the safety of persons and convenience of the public.

24. USE OF THE DEPOT

- 24.1 On completion of the construction of the Depot, the Infraco shall enter into and execute the Depot Licence in the form set out in Schedule Part 32 (*Depot Licence*).
- 24.2 Subject to the Infraco executing the Depot Licence and complying with and procuring the Infraco Parties' compliance with the obligations in this Clause 24 (*Use of the Depot*) and the Depot Licence, the Infraco and the Infraco Parties shall have the right to access and use those parts of the Depot which the Infraco and the Infraco Parties properly require to so use for the purpose of carrying out the Infraco Works (including the Maintenance Services) in accordance with this Agreement.
- 24.3 The Infraco agrees that:
- 24.3.1 the right to access and use the Depot granted pursuant to this Clause 24 (*Use of the Depot*) and the Depot Licence shall terminate on the earlier of the Termination Date or the Expiry Date; and
- 24.3.2 the Infraco's and the Infraco Parties' right to use such parts of the Depot shall not create any relationship of landlord and tenant.
- 24.4 Neither CEC nor **tie** give any warranty as to the condition or fitness for purpose of the Depot.
- 24.5 Subject to the exception set out in Clause 77.2, **tie** and CEC shall not be liable for the death of or injury to persons or damage to any property or for any losses, claims, demands, actions, proceedings, damages, costs or expenses or other liability incurred by the Infraco and/or the Infraco Parties or any person in the use of the Depot.
- 24.6 Nothing in this Clause 24 (*Use of the Depot*) or the Depot Licence shall restrict **tie's** and **tie** Parties' absolute right of access to any part of the Depot at any time provided that if such access disrupts or interferes with the performance by Infraco or any Infraco Party of the Infraco Works, such disruption or interference shall be a Compensation Event.

PART 6 - PERSONNEL

25. TIE'S REPRESENTATIVE

- 25.1 Subject to Clause 25.2, **tie's** Representative may exercise the authority of **tie** specified in the Agreement. **tie's** Representative shall:

25.1.1 be responsible for the day to day monitoring of the Infraco Works to be performed by the Infraco;

25.1.2 exercise such functions and powers of **tie** under this Agreement as **tie** may notify in writing to the Infraco from time to time; and

25.1.3 be the primary point of contact for the Infraco with **tie**;

and the Infraco shall observe, and shall procure that any Infraco Party observes, all reasonable instructions of **tie** and **tie's** Representative given in accordance with this Agreement. The Infraco shall not and shall procure that any Infraco Party shall not act upon any instruction from any other party unless confirmed by **tie** or **tie's** Representative in writing. If the Infraco or any Infraco Party shall receive any such instructions, the Infraco shall notify **tie** or **tie's** Representative immediately.

25.2 **tie** may by notice in writing to the Infraco from time to time, restrict the authority of **tie's** Representative and/or require **tie's** Representative to obtain the specific approval of **tie** before exercising any such authority. In the event of such restriction or requirement, the Infraco shall look to **tie** to exercise the relevant authority or to confirm that **tie** has given the relevant approval.

25.3 Except as expressly stated in the Agreement, **tie's** Representative shall have no authority to amend the Agreement nor to relieve the Infraco of any of its obligations under the Agreement.

25.4 **tie** may by notice in writing to the Infraco change the identity of **tie's** Representative. **tie** shall consult with the Infraco prior to the appointment of any replacement for **tie's** Representative, taking account of the need for liaison and continuity in respect of this Agreement. Such change shall have effect on the date specified in the written notice.

25.5 During any period when a **tie's** Representative has not been appointed (or when **tie's** Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement), **tie** shall carry out the functions which would otherwise be performed by **tie's** Representative.

25.6 No decision, act or omission of **tie** or **tie's** Representative shall, except as otherwise expressly provided in this Agreement:

25.6.1 in any way relieve or absolve the Infraco from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement;

- 25.6.2 in the absence of an express written instruction or authorisation issued by **tie** under Clause 80 (**tie Changes**) constitute or authorise a variation; or
- 25.6.3 be construed as restricting or binding **tie** in any way save with regard to the specific project matters to which it relates.
- 25.7 Where **tie's** Representative is not a single named individual, **tie's** Representative shall within 7 days of the Effective Date notify to the Infraco in writing the name of the individual who will act on its behalf and assume the full responsibilities of **tie's** Representative under the Agreement. **tie's** Representative shall thereafter in like manner notify the Infraco of any replacement of the named individual.
- 25.8 **tie's** Representative may from time to time delegate any of the duties and authorities vested in **tie's** Representative, and **tie's** Representative may at any time revoke such delegation. Any such delegation:
- 25.8.1 shall be in writing and shall not take effect until such time as a copy thereof has been delivered to the Infraco or the Infraco's Representative; and
- 25.8.2 shall continue in force until such time as **tie's** Representative shall notify the Infraco in writing that the same has been revoked.
- 25.9 Instructions given by **tie's** Representative or by any person exercising delegated duties and authorities under Clause 25.8 shall be in writing. Provided that if for any reason it is considered necessary to give any such instruction orally the Infraco shall comply therewith.
- 25.10 Any such oral instruction shall be confirmed in writing as soon as is possible under the circumstances. Provided that if the Infraco confirms in writing any such oral instruction which confirmation is not contradicted in writing by **tie's** Representative forthwith it shall be deemed to be an instruction in writing by **tie's** Representative.
- 25.11 Upon the written request of the Infraco, **tie's** Representative or the person exercising delegated duties or authorities under Clause 25.8 shall specify in writing under which of his duties and authorities the instruction is given.

26. INFRACO'S SUPERINTENDENCE AND KEY PERSONNEL

- 26.1 The Infraco shall provide all necessary superintendence during the construction and completion of the Infraco Works. Such superintendence shall be given by sufficient persons having adequate knowledge of the operations to be carried out (including the methods and

techniques required, the hazards likely to be encountered and methods of preventing accidents) for the satisfactory and safe construction of the Infraco Works.

- 26.2 The Infraco's senior representative on the Site ("**Infraco's Representative**") must be approved by **tie**, for which purpose the Infraco shall first provide **tie** with full details of the experience and qualifications of the Infraco's Representative.
- 26.3 The Infraco shall ensure that, so long as the Infraco's Representative remains an employee or servant of the Infraco and is not incapacitated by illness or otherwise nor absent in consequence of his reasonable holiday entitlement, the Infraco's Representative shall undertake overall supervision of the Infraco Works for whatever time may be required to ensure the completion of the Infraco Works in accordance with the Agreement. The Infraco's Representative shall be responsible for the safety of all Infraco Works.
- 26.4 The Infraco's Representative shall:
- 26.4.1 act as the principal point of contact for **tie**, and **tie's** Representative in relation to all matters related to this Agreement;
 - 26.4.2 have full authority to act on behalf of the Infraco for all purposes of this Agreement, and **tie** and **tie's** Representative shall be entitled to treat all instructions and directions of the Infraco's Representative as those of the Infraco; and
 - 26.4.3 manage and co-ordinate the provision of the Infraco Works by the Infraco (and any Sub-Contractor) and the integration of provision of the Infraco Works with the tasks being performed by **tie's** internal team and the other advisers and contractors appointed by **tie** (where such tasks have been notified to the Infraco), and liaise with **tie's** Representative in relation to matters arising in relation to the Infraco Works.
- 26.5 The Infraco's Representative shall not be changed by the Infraco without the consent of **tie** to such change (which consent shall not be unreasonably withheld or delayed) and the Infraco shall provide **tie's** Representative with full details of the experience and qualifications of the proposed substitute Infraco's Representative. The Infraco shall take account of the need for liaison and continuity in respect of the provision of the Infraco Works in accordance with the Programme when any change is proposed.
- 26.6 The Infraco shall also nominate a deputy to the Infraco's Representative. During any period when the Infraco's Representative is unable through illness, incapacity, annual leave or any other reason whatsoever to carry out or exercise his functions under this Agreement, such

deputy shall carry out the functions which would otherwise be performed by the Infraco's Representative.

- 26.7 **tie** may at any time request the removal from the Infraco Works of the Infraco's Representative or his deputy for reasons of incompetence or gross misconduct and request the prompt appointment of a satisfactory substitute, approved by **tie** and the Infraco shall provide **tie's** Representative with full details of the experience and qualifications of the proposed substitute.
- 26.8 Any costs incurred by the Infraco in replacing the Infraco's Representative (in any circumstances) shall be borne by the Infraco.
- 26.9 The Infraco shall ensure that the Key Personnel shall have day-to-day responsibility for and be involved in the performance of the Infraco Works.
- 26.10 In addition to the Key Personnel, there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) available for the provision of the Infraco Works in accordance with this Agreement. This obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness and other absences, and anticipated and actual peaks in servicing the requirements for the Infraco Works.
- 26.11 The Infraco shall locate staff at such locations as the Infraco considers convenient for the Infraco Works, provided that:
- 26.11.1 the Infraco acknowledges that it will not be entitled to any reimbursement from **tie** in relation to the travel of any person to or from Edinburgh, or for the accommodation or subsistence of any person visiting Edinburgh; and
- 26.11.2 **tie** will require the Infraco to make the Key Personnel available for meetings in Edinburgh at such times as **tie** may, in its absolute discretion direct subject to reasonable advance notice of such meetings being given by **tie** to the Infraco.
- 26.12 The Infraco shall, and shall use reasonable endeavours to procure that the Tram Supplier and Tram Maintainer, ensures that there are no changes to the Key Personnel without **tie's** prior written consent (such consent not to be unreasonably withheld or delayed) and that any replacement persons shall be of at least equivalent status and ability to the person whom they replace.

- 26.13 The Infraco shall use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Infraco Works and shall select Key Personnel having careful regard to those persons' existing work load and other planned commitments.
- 26.14 The Infraco shall ensure that its Key Personnel shall:
- 26.14.1 have the level of skill, experience and authority appropriate to (i) the Infraco Works to which such staff are allocated, and (ii) the standards to be achieved pursuant to this Agreement; and
- 26.14.2 receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all regulatory requirements appropriate to and required for the performance of the Infraco Works in accordance with this Agreement.
- 26.15 All Key Personnel should have a nominated deputy who shall be capable of fulfilling the duties of the person to whom they are deputising in the event of their absence and who shall be kept fully informed of project status in the relevant area.
- 26.16 The Infraco shall not, during the period of this Agreement, contract or retain as an adviser or consultant, any person currently or previously employed or engaged as appropriate in the previous 3 months by **tie** unless the prior written approval of **tie** has been obtained. For the avoidance of doubt, this Clause 26.16 shall not apply to the SDS Provider, the Tram Supplier and the Tram Maintainer.
- 26.17 The Infraco shall (and shall procure that the Key Personnel, its staff employed in the performance of the Infraco Works and the Infraco Parties) comply with all regulatory requirements appropriate to and required for the performance of the Infraco Works, **tie's** Drug and Alcohol Policy.
- 26.18 The Infraco shall not at the Depot or at any premises from where any Infraco Parties carry out the Infraco Works and/or any obligations under this Agreement at any time allow the consumption of, or work under, the influence of alcoholic liquors or drugs or give, sell or barter any alcoholic liquors or drugs or permit or suffer any such gift, sale or barter to be made by any Infraco Party.

27. REMOVAL OF INFRACO'S EMPLOYEES

- 27.1 The Infraco shall employ or cause to be employed in and about the construction and completion of the Infraco Works and in the superintendence thereof only persons who are careful, skilled and experienced in their several trades and callings. The Infraco shall ensure

that its site supervisors and operatives who are involved in carrying out the Infraco Works shall have CSCS (or equivalent) certification, if relevant to the works they are performing.

27.2 Notwithstanding the provisions of paragraph 6 of parts A and B of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*), **tie's** Representative shall be at liberty to object to and require the Infraco to remove or cause to be removed from the Infraco Works any person employed thereon who in the opinion of **tie's** Representative mis-conducts himself or is incompetent or negligent in the performance of his duties or fails to conform with any particular provisions with regard to safety which may be set out in this Agreement or persists in any conduct which is prejudicial to safety or health, and such persons shall not be again employed upon the Infraco Works without the permission of **tie's** Representative.

27.3 Any costs incurred by the Infraco in removing, or causing to be removed, a person in accordance with this Clause 27 (*Removal of Infraco's Employees*) shall be borne by the Infraco.

28. SUB-LETTING AND THE APPOINTMENT OF SUB-CONTRACTORS

28.1 The Infraco shall not sub-contract the whole of the Infraco Works.

28.2 Subject to Clauses 28.3 and 28.4, the Infraco may sub-contract part of the Infraco Works with the prior written approval of **tie**, to a sub-contractor, supplier, sub-consultant, specialist and/or other party for performance of that specific part of the Infraco Works. The consent of **tie** shall be deemed to have been given to the appointment of the Tram Supplier, the SDS Provider and the Tram Maintainer. The consent of **tie** shall also be deemed to have been given to the appointment of the sub-contractors listed in Schedule Part 38 (*Approved Suppliers and Sub-Contractors and Trades*) and to the listed aspects of the Infraco Works and/or trades required for the Infraco Works in respect of which the Infraco may appoint a sub-contractor, sub-consultant, specialist and/or other party.

28.3 In respect of the Key Sub-Contractors not already approved and listed in Schedule Part 38 (*Approved Suppliers and Sub-Contractors and Trades*), the Infraco shall supply a reasonable level of relevant information (including curriculum vitae, information on relevant experience and technical capacity, insurance details and the methodology for provision of the sub-let works) required by **tie** to enable a decision to be made by **tie** on the suitability of the proposed Key Sub-Contractors to perform the relevant part of the Infraco Works. **tie's** decision on the use of and identity of any sub-contractor, supplier, sub-consultant, specialist and/or other party shall not be unreasonably withheld or delayed provided that **tie** is entitled to so withhold its decision if:

- 28.3.1 **tie** considers that the proposed Key Sub-Contractor has an unacceptable safety record;
- 28.3.2 such Key Sub-Contractor will not provide a collateral warranty in accordance with Clause 28.7 unless Infraco provides a collateral warranty in accordance with Clause 28.10;
- 28.4 The Infraco shall obtain **tie's** approval to the form of sub-contract for any work which is to be sub-contracted to each Key Sub-Contractor in advance of such sub-contract's execution. **tie** shall notify the Infraco of its approval within 10 Business Days of a request for such approval by the Infraco which approval may only be withheld by **tie** acting reasonably if:
- 28.4.1 the sub-contract does not in substance reflect the Infraco and the relevant Key Sub-Contractor as parties to such sub-contract, the provisions listed in Schedule Part 38 (*Approved Suppliers and Sub-Contractors and Trades*) Part II in so far as they relate to the work that is to be sub-contracted; or
- 28.4.2 the terms of the sub-contract will result in Infraco being unable to perform its obligations under this Agreement.
- 28.5 The Infraco shall, and shall procure that every Sub-Contractor shall, provide and employ in connection with the execution of the Infraco Works:
- 28.5.1 only such technical assistants as are skilled, experienced and assessed as competent for undertaking a specified range of activities in their respective occupations and, as appropriate, such sub-agents, foremen and leading hands as are competent to give proper supervision to the work they are required to supervise; and
- 28.5.2 such skilled, semi-skilled and unskilled labour as is necessary for the proper and timely execution of the Infraco Works.
- 28.6 Notwithstanding the provisions of paragraph 6 of parts A and B of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*), **tie's** Representative shall be at liberty after due warning in writing to require the Infraco to remove from the Infraco Works any employee of the Infraco and/or an employee of a Sub-Contractor who mis-conducts itself or is incompetent or negligent in the performance of its duties or fails to conform with any particular provisions with regard to safety which may be set out in the Agreement or persists in any conduct which is prejudicial to safety or health and such employee shall not be again employed upon the Infraco Works without the permission of **tie's** Representative.

- 28.7 Subject to Clause 28.10, the Infraco shall procure that every Key Sub-Contractor (excluding the Tram Supplier, the Tram Maintainer and the SDS Provider) provide to **tie** a collateral warranty prior to the date of execution of the relevant sub-contract:
- 28.7.1 in favour of **tie** in the form set out in part F of Schedule Part 8, (*Bonds, Parent Company Guarantees and Collateral Warranties*) with only such amendments as **tie** may approve such approval to be provided by **tie** within 10 Business Days of receipt of the proposed collateral warranty; and/or
- 28.7.2 in favour of CEC, EAL, TEL and Network Rail (in this case, where relevant to Network Rail infrastructure, the operational railway and railway assets or its safety case and emergency procedures) in respect of carrying out the Infraco Works in the form set out in part F of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) or in the case of EAL in the form set out in Appendix 8 to Schedule Part 44 (*EAL Works*); or
- 28.7.3 where the form referred to in Clause 28.7.1 or 28.7.2 cannot be obtained, in a different form acceptable to both Parties acting reasonably and taking account of industry practice and in the case of a collateral warranty to be granted in favour of any person other than **tie**, the beneficiary's requirements.
- 28.8 NOT USED.
- 28.9 Subject to Schedule Part 4 (*Pricing*) the Infraco shall be and shall remain wholly liable to **tie** under this Agreement for carrying out and completing the Infraco Works including any part of the Infraco Works carried out by any Sub-Contractor.
- 28.10 In any case where the Infraco is unable to obtain a collateral warranty from a Key Sub-Contractor in accordance with Clause 28.7 and can demonstrate to **tie's** satisfaction that it has used reasonable endeavours to do so prior to entering into contract with such Key Sub-Contractor the Infraco shall, if so required by **tie**, expressly warrant the Key Sub-Contractor's works in the form as would have been granted by the Key Sub-Contractor with the exception of the cap on liability under such collateral warranty which shall be expressed in the same terms as the Infraco Collateral Warranty. The inability to provide the collateral warranty from the Key Sub-Contractor in the circumstances described in this sub-clause shall not constitute a breach of this Clause 28.

PART 7 - GENERAL CONSTRUCTION AND MAINTENANCE OBLIGATIONS

29. SETTING-OUT

- 29.1 Save in relation to the Tram Maintenance Services and the Tram Supply Obligations, until the issue of the Patent Defects Rectification Certificate in terms of Clause 46, the Infraco shall be responsible for the accurate setting-out of the Infraco Works and for the correctness of the position, levels, dimensions and alignment of all parts of the Infraco Works and for the provision of all necessary instruments, appliances and labour in connection therewith.
- 29.2 Save in relation to the Tram Maintenance Services and the Tram Supply Obligations, until the issue of the Patent Defects Rectification Certificate in terms of Clause 46, if at any time during the progress of the Infraco Works, any error shall appear or arise in the position, levels, dimensions or alignment of any part of the Infraco Works, the Infraco, on being required so to do by **tie's** Representative, shall at its own cost rectify such error to the satisfaction of **tie's** Representative (acting reasonably).
- 29.3 The checking of any setting-out or of any line or level by **tie's** Representative shall not in any way relieve the Infraco of its responsibility for the correctness thereof and the Infraco shall carefully protect and preserve all bench-marks, sight rails, pegs and other things used in setting out the Infraco Works.

30. SAFETY AND SECURITY

- 30.1 The Infraco shall throughout the execution and completion of the Infraco Works have full regard for the safety of all persons entitled to be upon the Site and shall keep the Site (so far as the same is under its control) and the Infraco Works, in an orderly state appropriate to the avoidance of danger to such persons.
- 30.2 The Infraco shall provide and maintain at its own cost all lights, guards, fencing, warning signs and watching when and where necessary, or required by **tie's** Representative (acting reasonably), or required in accordance with Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*), and/or in accordance with Good Industry Practice or by any statutory or other competent authority for the protection of the Infraco Works or for the safety of the public or others whilst minimising inconvenience.
- 30.3 The Infraco shall comply with, shall procure that the Infraco Parties shall 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.