

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

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

83.2 **tie** shall not require the Infraco to carry out any Accommodation Works the execution of which would require input from the SDS Provider. Any such instruction shall be given pursuant to Clause 80 (*tie Changes*).

83.3 The Infraco and **tie** or **tie's** Representative shall agree the timing of any Accommodation Works so as to minimise any inconvenience to **tie** and/or the Infraco and/or disruption to the Programme. The Infraco shall take all reasonable steps to minimise the duration of any Accommodation Works. For the avoidance of doubt, the timing of any agreed Accommodation Works shall not be treated as forming part of the Programme and a separate programme for the completion of such Accommodation Works shall be agreed between **tie** and the Infraco (both Parties acting reasonably). For the avoidance of doubt, if any Relief Event or Compensation Event occurs and has an impact on the progress of the Accommodation Works, then any extension of time or relief granted in accordance with Clause 64 (*Relief Events*) or Clause 65 (*Compensation Events*) shall be granted in respect of the programme for the completion of the Accommodation Works not the Programme.

83.4 If, at any time within 5 Business Days following receipt by **tie** of an Accommodation Works Cost Notice pursuant to Clause 83.1, **tie** notifies the Infraco in writing that **tie** or **tie's** Representative wishes the Infraco to proceed with the Accommodation Works to which the Accommodation Works Cost Notice relates, the Infraco shall subject to Clause 18 carry out and complete such Accommodation Works in accordance with the said Accommodation Works Cost Notice and the relevant request pursuant to Clause 83.1 from **tie** in accordance with the programme agreed pursuant to Clause 83.3 but otherwise as soon as reasonably practicable.

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

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

83.6.1 the Programme in accordance with Clause 60;

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

83.6.3 any other previously accepted Deliverable

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

84. QUALIFYING CHANGES IN LAW

84.1 If a Qualifying Change in Law occurs or is to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

84.1.1 any necessary change in the Infraco Works;

84.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law; or

84.1.3 whether relief from compliance with any obligations under this Agreement is required as a result of the Qualifying Change in Law;

in each case giving in full detail the procedure for implementing the Qualifying Change in Law. Responsibility for any costs of such implementation shall be dealt with in accordance with Clauses 84.2 and 84.3 below.

84.2 As soon as reasonably practicable after receipt of any notice from either Party under Clause 84.1 above, the Parties shall discuss and agree the issues referred to in Clause 84.1 above and any ways in which the Infraco can mitigate the effect of the Qualifying Change in Law and the Infraco shall:

84.2.1 provide evidence to **tie** that the Infraco has used and will continue to use all reasonable endeavours (including where appropriate and practicable the use of competitive quotes) to minimise any increase in costs and maximise any reduction in costs;

84.2.2 demonstrate how the effects of the Qualifying Change in Law will be mitigated;

84.2.3 demonstrate that the relevant changes will be implemented in the most cost effective manner.

84.3 As soon as reasonably practicable after the issues referred to in Clause 84.2 have been agreed between the Parties or determined pursuant to the Dispute Resolution Procedure, **tie** shall give a **tie** Notice of Change on the basis that an extension of time will be granted to the Infraco to perform its obligations under this Agreement, to the extent that such performance is affected by the Qualifying Change in Law and that any effect on the cost to the Infraco of performing its obligations under this Agreement of any Qualifying Change in Law shall be borne by **tie** and the provisions of Clause 80 (*tie Changes*) shall apply except that the Infraco shall be obliged to implement and **tie** shall be obliged to instruct the change in all circumstances (except to the extent that such change is not necessary to implement the Qualifying Change in Law or where **tie** has instructed a **tie** Change in order to remove the requirement to comply with a Qualifying Change in Law). **tie** shall issue a **tie** Change Order once it has been agreed or determined pursuant to the Dispute Resolution Procedure. In assessing the value of any change, **tie** shall subject to Clause 84.4, pay the agreed or determined amount for each and every Qualifying Change in Law.

84.4 In accordance with Clause 84.3, payment shall be due from **tie** to the Infraco:

84.4.1 subject to Clauses 84.4.2, 84.4.3, 84.4.4 and 84.4.5, in respect of Qualifying Changes in Law the value of which when aggregated with the value of all previous Qualifying Changes in Law exceed a threshold of £150,000 in aggregate, the amount by which the value of such Qualifying Change in Law exceeds such threshold when aggregated with the value of all previous Qualifying Changes in Law;

84.4.2 where the threshold under Clause 84.4.1 has been exceeded, in respect of SDS Qualifying Changes in Law the value of which are above a threshold of £15,000 in respect of each and every event the amount by which the value of such Qualifying Change in Law exceeds such threshold;

84.4.3 where the threshold under Clause 84.4.1 has been exceeded, in respect of Tram Supply Qualifying Changes in Law the value of which are above a threshold of £30,000 in respect of each and every event the amount by which the value of such Qualifying Change in Law exceeds such threshold; and

84.4.4 in respect of Tram Maintenance Qualifying Changes in Law, for the first 5 years following the Service Commencement Date the value of which are above a threshold of £15,000 in respect of each and every event the amount by which the value of such Tram Maintenance Qualifying Change in Law exceeds such threshold up to an aggregate of £150,000 and thereafter any Tram Maintenance Qualifying Changes in Law will be dealt with as a Mandatory **tie** Change.

- 84.5 Except otherwise expressly provided in this Agreement, the Infraco shall be responsible for any increase in its costs and shall not be entitled to any relief from its obligations under this Agreement to the extent that the same is caused as a result of a General Change in Law at any time during the Term.
- 84.6 Where a General Change in Law raises a technical, design or performance issue that requires a revision of the delivery of the Tram Maintenance Services, the Infraco shall take all possible measures to ensure that the Edinburgh Tram Network is operating in accordance with the relevant Legislation, but will not be responsible for the cost and delivery implications of such General Change in Law beyond that for which the Tram Maintainer is responsible under the Tram Maintenance Agreement.
- 84.7 The Infraco shall be entitled to benchmark any costs and expenditure affected by a General Change in Law or likely to be affected by a forthcoming General Change in Law (the "**Benchmarking Exercise**") after the expiry of 3, 6 and 9 years following the Service Commencement Date.
- 84.8 The Benchmarking Exercise shall be undertaken by comparing the relevant elements of the costs and expenditure applicable to the Maintenance Services as set out in Schedule Part 7 (*Maintenance Contract Pricing Analysis*) prior to the affect of any General Change in Law (the "**Base Price**") with the actual or projected costs and expenditure applicable to the relevant elements of the Maintenance Services following such costs and expenditure being affected by any General Change in Law (the "**Adjusted Price**").
- 84.9 The Infraco shall provide the results of such Benchmarking Exercise to **tie** together with details of the extent to which the Adjusted Price differs from Base Price (the "**Benchmarking Information**").
- 84.10 **tie** shall agree or dispute the Benchmarking Information. **tie** may dispute the Benchmarking Information by notifying Infraco of the basis on which it disputes the Benchmark Information, including whether **tie** believes that there may be the need for a **tie** Change or other action under the Agreement to address the fact that the further provision of the Maintenance Services becoming not economically reasonable for **tie**. If notification is served by **tie**, the Parties shall use reasonable endeavours to resolve such dispute within 20 Business Days of receipt of notification by Infraco, failing which either Party will be entitled to refer the matter to the Dispute Resolution Procedure. In the event that **tie** does not agree or dispute the Benchmarking Information within 40 Business Days of receipt of the same from Infraco, **tie** shall be deemed to have agreed the Benchmarking Information.

84.11 Where the Benchmarking Information has been agreed or determined pursuant to Clause 84.10 and the Adjusted Price is higher than the Base Price then the relevant costs and expenditure applicable to the relevant elements of the Maintenance Service set out in Schedule Part 7 (*Maintenance Contract Pricing Analysis*) shall be increased by the amounts set out in the Benchmarking Information and such increase shall be a Mandatory **tie** Change.

85. PHASE 1B OPTION

85.1 Not later than 31 October 2008, the Infraco acknowledges that **tie** may, by providing the Infraco with a written notice, instruct that the Infraco prepare a proposal for the implementation of the Phase 1b Works on the basis of Schedule Part 37 (*Phase 1b Works*). If so instructed by **tie**, the Infraco shall carry out the Phase 1b Works and, subject to Clause 85.2, the provisions of this Agreement shall apply to the Phase 1b Works.

85.2 Any ambiguities or discrepancies in the Agreement which arise as a result of the notice to proceed in respect of the Phase 1b Works shall be resolved in accordance with Clause 4 (*Priority of Contract Documents*), and any necessary changes to the Agreement shall be agreed between the Infraco and **tie**.

86. NETWORK EXPANSIONS

86.1 **tie** and the Infraco shall keep opportunities for Network Expansion under review throughout the Term.

86.2 From time to time during the Term, **tie** may propose to the Infraco a Network Expansion for development. To the extent that **tie** requests assistance from the Infraco in relation to the development of such Network Expansion:

86.2.1 the Infraco shall provide such services during the development of that Network Expansion and shall carry out any required design and/or any construction works and/or carry out any required maintenance, and the provisions of this Agreement and the Employer's Requirements (where applicable), shall apply to the development of that Network Expansion and any design and/or works and/or carry out any required maintenance; and

86.2.2 the carrying out of such services and any design and/or works and/or maintenance carried out by the Infraco in respect of such services shall be a **tie** Change.

86.3 **tie** may withdraw its request for the Infraco to such services and design and/or works and/or maintenance, and **tie** may continue with the development of such Network Expansion, either by itself or in conjunction with third parties.

86.4 Whether or not **tie** requests the Infraco to provide services and/or design and/or works and/or maintenance in relation to a proposed Network Expansion:

86.4.1 the Infraco shall provide access to such information, documents and records as may be reasonably requested by **tie** or the **tie** Parties in relation to the development of the proposed Network Expansion; and

86.4.2 **tie** and the Infraco will negotiate in good faith in relation to agreeing any amendments to this Agreement that are necessary in respect of the Network Expansion.

PART 16 - SUSPENSION, TERMINATION, EXPIRY AND HANDBACK

87. SUSPENSION OF WORK

87.1 The Infraco shall on the written order of **tie's** Representative suspend the progress of the Infraco Works or any part thereof for such time or times and in such manner as **tie's** Representative may consider necessary and shall during such suspension properly protect and secure the Infraco Works so far as is necessary in the opinion of **tie's** Representative. Except to the extent that such suspension is necessary by reason of breach of this Agreement by the Infraco and such breach is of such nature that would not permit continued performance of the Infraco Works without risk to the health and safety of any person or risk of substantial damage to property then if compliance with **tie's** Representative's instructions under this Clause 87 (*Suspension of Work*) involves the Infraco in delay or extra cost (including costs incurred in properly protecting and securing the work), such instructions shall be a Compensation Event and Clause 65 (*Compensation Events*) shall apply.

87.2 If the progress of the Infraco Works or any part thereof is suspended on the written order of **tie's** Representative and if permission to resume work is not given by **tie's** Representative within a period of six months from the date of suspension then the Infraco may unless such suspension is otherwise provided for in the Agreement or continues to be necessary by reason of some default on the part of the Infraco serve a written notice on **tie's** Representative requiring permission within 20 Business Days from the receipt of such notice to proceed with the Infraco Works or that part thereof in regard to which progress is suspended. If within the said 20 Business Days **tie's** Representative does not grant such permission, the Infraco by a further written notice so served may (but is not bound to) elect to treat the suspension where it

affects part only of the works as a Mandatory **tie** Change deleting such works from the Infraco Works or where it affects the whole Infraco Works, as a result of which the Infraco cannot perform any material part of its obligations under this Agreement for a continuous period of 45 Business Days, as a **tie** Default.

87.3 Upon termination of this Agreement on the grounds of **tie** Default pursuant to Clause 87.1:

87.3.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** Default had occurred in accordance with the provisions of Clause 88 (*Termination or Suspension for tie Default*); and

87.3.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

88. TERMINATION OR SUSPENSION FOR TIE DEFAULT

88.1 If a **tie** Default has occurred and the Infraco wishes to terminate this Agreement the Infraco may serve a termination notice on **tie** and such termination notice shall be in accordance with this Clause 88.

88.2 The Infraco shall specify in the termination notice the type of the **tie** Default which has occurred entitling the Infraco to terminate.

88.3 Provided the Infraco has complied with Clauses 88.1 and 88.2, this Agreement shall terminate on the day falling thirty Business Days after the date on which **tie** receives the termination notice, unless, in the case of a **tie** Default capable of rectification, **tie** rectifies the **tie** Default within thirty Business Days of receipt of the termination notice.

88.4 Subject to Clause 87.3, the Infraco shall not be entitled to, and shall not purport to, terminate this Agreement or accept any repudiation of this Agreement, except as expressly provided in this Clause 88 (*Termination or Suspension for tie Default*) or Clause 91 (*Termination by Reason of Force Majeure*).

88.5 Upon expiry of the thirty Business Days notice referred to in Clause 88.3 and notwithstanding the provisions of Clause 49 (*Non-Removal of Materials and Contractor's Equipment*) the Infraco shall with all reasonable despatch remove from the Site all Infraco's Equipment. In the event of any failure so to do **tie** shall have like powers to those contained in Clause 49.3 to dispose of any Infraco's Equipment.

- 88.6 No compensation shall be payable by **tie** to the Infraco for termination of this Agreement in terms of this Clause 88 (*Termination or Suspension for tie Default*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 88.8.
- 88.7 On termination of this Agreement in terms of this Clause 88 (*Termination or Suspension for tie Default*), the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).
- 88.8 Upon termination of this Agreement pursuant to Clause 88.3 and following receipt of a valid VAT invoice, **tie** shall pay the Infraco within 30 Business Days of receipt of such VAT invoice (in so far as such amounts or items have not already been covered by payments on account made to the Infraco) the value of all work carried out prior to the date of termination and in addition:
- 88.8.1 the amounts payable in respect of any preliminary items so far as the work or service comprised therein has been carried out or performed and a proper proportion of any such items which have been partially carried out or performed;
 - 88.8.2 the cost of materials or goods reasonably ordered for the Infraco Works which have been delivered to the Infraco or of which the Infraco is legally liable to accept delivery (such materials or goods becoming the property of **tie** upon such payment being made to the Infraco);
 - 88.8.3 the reasonable cost of removal under Clause 88.5;
 - 88.8.4 all other expenses properly, demonstrably and reasonably incurred by the Infraco arising from the termination of this Agreement including, without limitation, any amounts which the Infraco is required to pay to its subcontractors (including the Tram Supplier and the Tram Maintainer) in order to terminate any subcontracts relating to this Agreement (including the Tram Supply Agreement and the Tram Maintenance Agreement), provided such contracts have been entered into on reasonable commercial terms; and
 - 88.8.5
 - 88.8.5.1 in respect of any termination which occurs prior to the Service Commencement Date the loss of profit fixed at ten percent (10%) for civils and seventeen percent (17%) for track and systems calculated with reference to demobilisation costs; and

88.8.5.2 in respect of any termination which occurs after the Service Commencement Date a payment representing the amount to be paid to the Infraco for one Reporting Period in respect of full performance of the Infrastructure Maintenance Services as calculated in accordance with part A of Schedule Part 6 (*Maintenance Payment Regime*)

provided that:

- (i) the Infraco shall use all reasonable endeavours to minimise and mitigate any costs referred to in this Clause 88.8 and **tie** shall not be liable to pay the Infraco for such costs to the extent that the Infraco has failed to use all reasonable endeavours to minimise or mitigate such costs or to the extent that such costs have arisen out of the Infraco's breach of this Agreement or any negligent act or omission by the Infraco or any act or omission by the Infraco which is intended to disrupt, frustrate or delay due performance under Clauses 95 and 96. Any payment to be made under this Clause 88.8 shall be treated as a final account and payment shall be made by **tie** in accordance with Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) (as appropriate); and
- (ii) the Tram Supply Agreement and the Tram Maintenance Agreement shall be deemed to have been entered into on reasonable commercial terms.

88.9

88.9.1 If **tie** shall fail to pay the Infraco in full any amount properly due and payable under this Agreement by the final date for payment in accordance with the requirements of Clause 67 (*Payment in respect of Applications for Milestone Payments*) or Clause 68 (*Payment in respect of Maintenance Services*) (as appropriate) and no effective notice to withhold payment has been given by **tie** to the Infraco, the Infraco may, after giving **tie** ninety days' notice in writing of the same, stating the ground or grounds on which it is intended to suspend performance, suspend the performance of the Infraco Works until payment in full is made by **tie**.

88.9.2 Infraco shall be entitled to suspend performance of the Infraco Works in accordance with Clause 88.9.1 on 60 days notice where **tie** has failed to pay and CEC has failed to make payment of the relevant amount in accordance with the CEC Guarantee (for the avoidance of doubt such period of 60 days shall operate instead of the 90 day period in Clause 88.9.1).

89. VOLUNTARY TERMINATION BY TIE

89.1 Three years after the issue of the first Certificate of Service Commencement, **tie** may terminate this Agreement at any time and for whatever reason upon giving written notice to the Infraco that this Agreement shall terminate on the date falling six months after the date of service of such written notice.

89.2 Upon termination of the Infraco's employment pursuant to Clause 89.1,

89.2.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** Default had occurred in accordance with the provisions of Clause 88 (*Termination or Suspension for tie Default*); and

89.2.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

90. TERMINATION ON INFRACO DEFAULT

90.1 In the event that an Infraco Default:

90.1.1 as stipulated pursuant to Infraco Default (c), (d), (e), (g) and (i) in Schedule Part 1 occurs then **tie** may after giving 7 Business Days notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred, terminate this Agreement.

90.1.2 as stipulated pursuant to Infraco Default (a), (f), (g) (to the extent that the Underperformance Warning Notices have been issued pursuant to Clause 56.7.2) and (j) in Schedule Part 1 occurs **tie** may give notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred (a "**Remediable Termination Notice**").

90.1.3 as stipulated pursuant to Infraco Default (b) in Schedule Part 1 occurs **tie** may give notice in writing to the Infraco specifying the nature of the Infraco Default which has occurred (an "**Insolvency Termination Notice**").

90.2 Following service of a Remediable Termination Notice by **tie** in accordance with Clause 90.1.2 the Infraco may submit a comprehensive rectification plan setting out how it intends to remedy the Infraco Default in respect of which the Remediable Termination Notice has been served to **tie** within 30 Business Days of the date of such notice (or such longer period as **tie** may agree to in its absolute discretion). **tie** shall consider such rectification plan and

determine, at **tie's** absolute discretion, within 10 Business Days of receipt whether the rectification plan is acceptable. If **tie** accepts the rectification plan, the Remediable Termination Notice shall no longer be effective and no further Remediable Termination Notice will be served by **tie** in respect of the relevant Infraco Default, provided that the Infraco complies in full with the terms of the rectification plan as accepted by **tie**. Any failure by Infraco to comply with the terms of such rectification plan shall entitle **tie** to terminate the Agreement on 5 Business Days written notice to the Infraco and there shall be no obligation on **tie** to consider any further rectification plan.

- 90.3 Following service of an Insolvency Termination Notice by **tie** in accordance with Clause 90.1.3 the Infraco Member not effected by the Insolvency Event may submit a comprehensive rectification plan setting out how it intends to continue to provide the Infraco Works without the other Infraco Member within 30 Business Days of the date of such notice (or such longer period as **tie** may agree to in its absolute discretion) **tie** shall consider such rectification plan and determine, acting reasonably, within 10 Business Days of receipt whether the rectification plan is acceptable.
- 90.4 If **tie** does not accept the rectification plan submitted by Infraco or Infraco does not (for any reason) submit a rectification plan within the 30 Business Day period (or such longer period as has been agreed by **tie**), **tie** may after giving 5 Business Days notice in writing to the Infraco terminate this Agreement.
- 90.5 For the avoidance of doubt, neither the submission of any rectification plan nor **tie's** consideration of it shall relieve the Infraco in any way from the due and proper performance of all of its obligations under this Agreement. Any expenditure or liability incurred by Infraco in preparing and submitting any rectification plan shall be to the account of the Infraco.
- 90.6 Following termination under this Clause 90, **tie** may enter upon the Infraco Works and any other parts of the Site and expel the Infraco therefrom without thereby avoiding the Agreement or releasing the Infraco from any of its obligations or liabilities under the Agreement.
- 90.7 Following termination in accordance with this Clause 90, where **tie** has entered upon the Infraco Works and any other parts of the Site as set out in Clause 90.1, **tie** may:
- 90.7.1 complete or carry out the Infraco Works itself; or
- 90.7.2 employ any other contractor to complete the Infraco Works.

and in the event of termination of this Agreement on the grounds of Infraco Default (b) may use for such completion any of the Infraco's Equipment, Temporary Works, goods and

materials on any part of the Site and shall continue to enjoy (i) its right to copy and use all drawings specifications and other documents made by or on behalf of the Infraco and (ii) all rights granted to **tie** pursuant to Clause 102 (*Copyright and Intellectual Property*)

90.8 In the event of termination of this Agreement on the grounds of Infraco Default (b):

90.8.1 **tie** may at any time sell any of the said Infraco Member's Equipment or Temporary Works and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to it from the Infraco under the Agreement;

90.8.2 the Infraco agrees that an automatic assignation of all Key Subcontractor sub-contracts shall be effected by **tie** giving written notice of assignation to every Key Subcontractor as provided for in the relevant Key Subcontractor collateral warranty.

90.9 Where **tie** has entered upon the Infraco Works and any other parts of the Site, the Infraco shall, if so instructed by **tie's** Representative in writing within 7 days of such entry, use reasonable endeavours to assign to **tie** any agreement as soon as practicable which the Infraco may have entered into and which are, in **tie's** reasonable opinion, material to the completion of the Infraco Works for the supply of any goods or materials and/or for the carrying out of any work for the purposes of the Agreement.

90.10 The Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

90.11 No compensation shall be payable by **tie** to the Infraco for termination under this Clause 90 (*Termination on Infraco Default*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 90.15.

90.12 As soon as may be practicable after termination of this Agreement pursuant to Clause 90.1 the Parties shall agree as at the time of such termination:

90.12.1 the amount (if any) which has been reasonably earned and not yet paid pursuant to this Agreement by the Infraco in respect of work actually done by it under the Agreement;
and

90.12.2 the value of any unused or partially used goods and materials which are under the control of **tie** or CEC by reason of such termination and for which the Infraco has not yet been paid.

- 90.13 If **tie** enters upon the Infraco Works and any other parts of the Site and expels the Infraco in accordance with this Clause 90 (*Termination on Infraco Default*), **tie** shall not be liable to pay the Infraco any money under the Agreement (whether in respect of amounts certified by **tie's** Representative or otherwise) including any sums determined under Clause 90.11 unless or until **tie's** Representative certifies that an amount is due to the Infraco under Clause 90.15.
- 90.14 **tie's** Representative shall, within 6 months of completion of the works and services to be performed by the Infraco as part of the Infraco Works (excluding Maintenance Services) up to and including the Service Commencement Date and remaining to be completed at termination, certify:
- 90.14.1 the costs of completing the Infraco Works, not including any amount calculated as due to the Infraco pursuant to Clause 90.12, up to and including the Service Commencement Date in accordance with the terms of this Agreement (whether or not the Infraco Works are completed under a separate contract) and all other costs and expenses properly incurred by **tie**, less such sum as would have been due to the Infraco if the Infraco had completed the Infraco Works up to and including the Service Commencement Date together with any proceeds of sale under Clause 90.8; and
- 90.14.2 the amount **tie** will spend on the Maintenance Services (whether or not such services are provided under a separate contract) less the amount **tie** would have paid to the Infraco for the Maintenance Services over the Term.
- 90.15 Should the aggregate of the amount as certified by **tie's** Representative pursuant to Clauses 90.14.1 and 90.14.2 be:
- 90.15.1 a positive amount, and such amount is still a positive amount after subtraction of any amount calculated pursuant to Clause 90.12 then such amount shall be a debt due to **tie** from the Infraco payable within 30 Business Days.
- 90.15.2 a negative amount, and is still a negative amount after the addition of any amount calculated pursuant to Clause 90.12 then such amount shall be a debt due to the Infraco from **tie** payable within 30 Business Days.
- 90.16 If at any time prior to the completion of the Infraco Works any sum as calculated under Clauses 90.14.1 and 90.14.2 is a positive amount, **tie's** Representative may issue an interim certificate to that effect notwithstanding that the Infraco Works have not been completed.

- 90.17 Every certificate issued by **tie's** Representative pursuant to this Clause 90 (*Termination on Infraco Default*) shall be sent to the Infraco with such detailed explanation as may be necessary.
- 90.18 Subject to Clause 77.10 and Clause 77.11 the provisions of this Clause 90 (*Termination on Infraco Default*) are without prejudice to any other rights and remedies of **tie** including where **tie** is obliged to curtail the Infraco Works or suspend their performance for a period.
- 90.19 The Infraco shall notify **tie** as soon as practicable and in any event within 2 Business Days of any presentation of any petition for the purpose of winding up either Infraco Member or its parent company guarantor or for an administration order or the opening of an equivalent process under the Insolvency Act 1986, the EC Insolvency Regulation 1346/2000 or the Bundesinsolvenzgesetz of 5 October 1994 (as amended) in circumstances where Clause 75.1.6 would apply.

91. TERMINATION BY REASON OF FORCE MAJEURE

- 91.1 Neither Party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and such Party is directly prevented from carrying out such obligations by that Force Majeure Event provided that such prohibition on bringing a claim and exclusion of liability shall not operate if and to the extent that:
- 91.1.1 the Affected Party could, by the exercise of reasonable foresight and diligence, have prevented or reduced the effect of the Force Majeure Event; and
- 91.1.2 the Affected Party could, whether before or after the occurrence of the Force Majeure Event, have reduced or eliminated the resulting breach of its obligations under this Agreement by taking reasonable steps.
- 91.2 On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as reasonably practicable, specifying details of the Force Majeure Event and providing evidence of its effect on the obligations of the Affected Party and any action proposed to remove or mitigate its effect.
- 91.3 The Parties shall enter into *bona fide* discussions with a view to alleviating the effects of such Force Majeure Event as soon as reasonably practicable, and if the terms or measures to remove the effect of the Force Majeure Event cannot be agreed on or before the date falling 12 months after the date of the commencement of the Force Majeure Event or by the end of such

longer period as the Parties may have agreed, or such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with all or a material part of its obligations under this Agreement for a period of more than 12 months after the date of the commencement of the Force Majeure Event or by the end of such longer period as the Parties may have agreed, either Party shall have the option to terminate this Agreement by written notice to the other.

91.4 The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay to the performance of the Infraco Works and the Infraco shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

91.5 The Affected Party shall notify the other party as soon as reasonably practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

91.6 The effects of a Force Majeure Event shall be dealt with under Clause 64 (*Relief Events*).

91.7 No compensation shall be payable by **tie** to the Infraco for termination of this Agreement in terms of this Clause 91 (*Termination by Reason of Force Majeure*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 91.7.

91.8 Upon termination of the Infraco's employment pursuant to Clause 91.3,

91.8.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of **tie** default had occurred in accordance with the provisions of Clause 88 (*Termination or Suspension for tie Default*); and

91.8.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

92. TERMINATION FOR CORRUPT GIFTS AND FRAUD

92.1 The Infraco or anyone employed by it or acting on its behalf (including any Infraco Party) shall not commit any Prohibited Act.

- 92.2 If the Infraco, or anyone employed by it or acting on its behalf (including any Infraco Parties), commits any Prohibited Act, then **tie** shall be entitled to act in accordance with this Clause 92 (*Termination for Corrupt Gifts and Fraud*).
- 92.3 If a Prohibited Act is committed by the Infraco or by an employee of the Infraco not acting independently of the Infraco, then **tie** may terminate this Agreement by giving notice to the Infraco.
- 92.4 If a Prohibited Act is committed by an employee of the Infraco acting independently of the Infraco, then **tie** may give notice to the Infraco of termination and this Agreement will terminate, unless within thirty days of receipt of such notice the Infraco terminates that employee's employment and (if necessary) procures the performance of the relevant part of the Infraco Works by another person.
- 92.5 If a Prohibited Act is committed by anyone acting on behalf of the Infraco (excluding employees of the Infraco but including any Infraco Party, and their employees) and not acting independently of the Infraco, then **tie** may give notice to the Infraco of termination and this Agreement shall terminate.
- 92.6 If a Prohibited Act is committed by anyone acting on behalf of the Infraco (excluding employees of the Infraco but including any Infraco Party and their employees) and acting independently of the Infraco, then **tie** may give notice to the Infraco of termination and this Agreement will terminate, unless within thirty days of receipt of such notice the Infraco terminates that party's employment and procures the performance of the relevant part of the Infraco Works by another person.
- 92.7 Any notice of termination under this Clause 92 (*Termination for Corrupt Gifts and Fraud*) shall specify:
- 92.7.1 the nature of the Prohibited Act;
 - 92.7.2 the identity of the person whom **tie** believes has committed the Prohibited Act; and
 - 92.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause 92 (*Termination for Corrupt Gifts and Fraud*).
- 92.8 No compensation shall be payable by **tie** to the Infraco for termination of this Agreement in terms of this Clause 92 (*Termination for Corrupt Gifts and Fraud*) whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to payments due under Clause 92.9.

92.9 Upon termination of the Infraco's employment pursuant to this Clause 92 (*Termination for Corrupt Gifts and Fraud*);

92.9.1 **tie** shall be under the same obligations with regard to payment as if termination on the grounds of Infraco Default had occurred in accordance with the provisions of Clause 90 (*Termination on Infraco Default*); and

92.9.2 the Infraco shall comply with Clause 94 (*Effects of Termination or Expiry*) and Clause 95 (*Transition on Termination or Expiry*).

93. PERSISTENT BREACH

93.1 If at any time after the first Sectional Completion Date when the Infraco is performing Maintenance Services, whether or not in pursuance of Clause 52 (Maintenance), the same breach by the Infraco of any of its obligations under this Agreement (other than a breach for which **tie** has an express remedy under this Agreement) has occurred three or more times in any twelve month rolling period **tie** may serve a notice, which notice shall not be served vexatiously or in respect of a trivial breach ("**Persistent Breach Notice**") on the Infraco:

93.1.1 specifying that it is a Persistent Breach Notice;

93.1.2 giving reasonable details of the breach; and

93.1.3 stating that such breach is a breach which could reasonably be expected to cause detriment of **tie**, if it recurs frequently or continues, and may result in a termination of this Agreement.

93.2 If, following service of such a Persistent Breach Notice, the breach specified has continued or occurred a further twice after the date falling 30 days after the date of service of the Persistent Breach Notice and before the date falling 365 days after the date of service of such notice, then **tie** may serve another notice ("**Final Persistent Breach Notice**") on the Infraco:

93.2.1 specifying that it is a Final Persistent Breach Notice;

93.2.2 stating that the breach specified has been the subject of a prior Persistent Breach Notice within the period of 365 days prior to the date of service of the Final Persistent Breach Notice; and

93.2.3 stating that if such failure is not remedied within fifteen days or is remedied and occurs twice or more within the 180 day period after the date of service of the Final Persistent Breach Notice, this Agreement may be terminated with immediate effect.

- 93.3 Provided that for the purpose of this Clauses 93.1 and 93.2.3 respectively, a breach shall only be deemed to have:
- 93.3.1 occurred three or more times where it has occurred three or more times as a result of the same breach having been committed by (i) the same Infraco Party or (ii) any of Infraco, SDS Provider, Tram Supplier or Tram Maintainer.
- 93.3.2 occurred more than twice where it has occurred more than twice as a result of the same breach having been committed more than twice by (i) the same Infraco Party or (ii) any of Infraco, SDS Provider, Tram Supplier or Tram Maintainer.
- 93.4 Where following the service of a Persistent Breach Notice or Final Persistent Breach Notice as the case may be, the Infraco has terminated or procured the termination of the agreement regarding the party whose acts or omissions gave rise to the service of the Persistent Breach Notice or Final Persistent Breach Notice as the case may be, all Persistent Breach Notices or Final Persistent Breach Notices served under this Clause 93 shall be deemed to be cancelled for the purpose of this Clause 93 and Clause 90 but only in respect of the first three occasions on which the Infraco replaces a subcontractor following service of a Persistent Breach Notice or Final Persistent Breach Notice.

94. EFFECT OF TERMINATION OR EXPIRY

- 94.1 Subject to the provisions of Clauses 88 (*Termination or Suspension for tie Default*), 91 (*Termination by Reason of Force Majeure*) and Clause 94.3, the Infraco shall not have any other right or remedy against **tie** on termination of this Agreement.
- 94.2 Subject to any exercise by **tie** of its rights to perform, or to procure a third party to perform, the obligations of the Infraco and subject to the right of the Infraco to suspend pursuant to Clause 88.9, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or breach or termination notice, until the termination of this Agreement becomes effective.
- 94.3 Any termination or expiry of this Agreement shall not prejudice or affect the accrued rights or claims of either Party.
- 94.4 On expiry of this Agreement or any earlier termination of this Agreement for whatever reason, all Deliverables and any information provided by **tie** to the Infraco shall be returned to **tie**, save for any documents which are required to be retained by the Infraco as a matter of Law, in such event certified true copies of the relevant documents shall be provided.

- 94.5 This Agreement shall terminate automatically on the expiry of this Agreement unless it shall have been terminated earlier in accordance with the provisions of this Agreement. The Infraco shall not be entitled to any compensation on expiry of the Agreement.
- 94.6 Expiry or termination of the Agreement shall not affect each Party's respective obligations under, Clause 67 (*Payment in respect of Applications for Milestone Payments*), Clause 68 (*Payment in respect of Maintenance Services*), Clause 69 (*Interest on Late Payments and Set-Off*), Clause 76 (*Required Insurances*), Clause 77 (*Indemnity by Infraco, Liability and Sole Remedy*) Clause 88 (*Termination or Suspension for tie Default*), Clause 89 (*Voluntary Termination by tie*), Clause 90 (*Termination on Infraco Default*), Clause 91 (*Termination by Reason of Force Majeure*), Clause 92 (*Termination for Corrupt Gifts and Fraud*), Clause 94 (*Effects of Termination or Expiry*), Clause 95 (*Transition on Termination or Expiry*), Clause 96 (*Surveys prior to Expiry Date*), Clause 97 (*Dispute Resolution Procedure*), Clause 101 (*Confidential Information*), Clause 102 (*Copyright and Intellectual Property*) and Clause 104 (*Information and Audit Access*) and those obligations shall continue in full force and effect.
- 94.7 Should the expiry of this Agreement result in an early termination of the Tram Maintenance Agreement or Tram Supply Agreement, **tie** shall make payment to the Infraco in respect of any payment the Infraco is obliged to make to the Tram Maintainer or Tram Supplier in accordance with the Tram Maintenance Agreement or Tram Supply Agreement (as appropriate).

95. TRANSITION ON TERMINATION OR EXPIRY

- 95.1 12 months before the Expiry Date and again, as updated, on the Expiry Date or upon termination, the Infraco shall provide to **tie** the following information ("**Handback Package**"):
- 95.1.1 (so far as Infraco is permitted) a list of all contracts, permits, licences, Consents or other documents which are material to the operation of the Edinburgh Tram Network or which have a value in excess of £50,000 or in the case of expiry or termination of the Tram Maintenance Agreement, £5,000, (as Indexed) showing (as appropriate) the contract account number, name, address and telephone number of the parties, contract price, value, term and notice period for termination or expiry date;
- 95.1.2 a list of all computer systems used for the maintenance of the Edinburgh Tram Network together with a description of the systems and all passwords where applicable;

- 95.1.3 the Technical Records and spare parts usage;
- 95.1.4 a list of Assets forming part of the Edinburgh Tram Network with a value of more than £25,000 or in the case of expiry or termination of the Tram Maintenance Agreement, £2,500, (as Indexed) or which are otherwise key to the operation of the Edinburgh Tram Network;
- 95.1.5 the names and addresses of all insurers providing the Required Insurances along with the applicable policy members and other references;
- 95.1.6 a letter, in a form reasonably satisfactory to **tie**, authorising **tie** and its agents to request and to receive from the relevant insurers details of all claims paid or outstanding under the Required Insurances; and
- 95.1.7 the TUPE Information.
- 95.2 **tie** shall not disclose the terms of the Handback Package to any third party, other than:
- 95.2.1 to the extent in the public domain, or as required by the Law or in the course of conducting, prosecuting or defending any Dispute, or following a Termination Notice in accordance with clauses 95.2.2 and 95.2.3; or
- 95.2.2 for the purpose of seeking offers from third parties for the provision of any of the Tram Maintenance Services (subject to the provisions of Clause 102 (*Copyright and Intellectual Property*)) and/or the Infrastructure Maintenance Services or like services following the termination or expiry of this Agreement; or
- 95.2.3 to a Successor Infraco or its sub-contractors for the purpose of ensuring or assisting with continuity of the Tram Maintenance Services and/or the Infrastructure Maintenance Services following termination or expiry of this Agreement provided that the Successor Infraco is required to comply with confidentiality obligations equivalent to those set out in Clause 101 (*Confidential Information*).
- 95.3 The Infraco shall maintain and manage the business of providing the Tram Maintenance Services (as far as is commercially reasonable) and the Infrastructure Maintenance Services with the intent that **tie** or any Successor Infraco would be able to take over that business and secure continuity of the Infrastructure Maintenance Services on a going concern basis at any time following a Termination Notice until the Termination Date becomes effective and/or the Tram Maintenance Services on a going concern basis at any time following a Termination

Notice until the Termination Date (as defined in the Tram Maintenance Agreement) becomes effective.

95.4 Accordingly, following the service of a Termination Notice or in the six month period preceding the expiry of this Agreement, the Infraco shall (and shall procure that the Infraco Parties shall):

95.4.1 take all reasonable steps and co-operate fully with **tie** and any Successor Infraco so that continuation of the Tram Maintenance Services and/or the Infrastructure Maintenance Services after such termination or expiry is achieved with the minimum disruption and so as to prevent or mitigate any inconvenience or risk to health or safety of any **tie** Parties and members of the public;

95.4.2 liaise with **tie** and any Successor Infraco and provide reasonable assistance and advice concerning the Tram Maintenance Services and/or Infrastructure Maintenance Services and their transfer to **tie** or to such Successor Infraco;

95.4.3 allow **tie** and any Successors Infraco access (at reasonable times and on reasonable notice) to each part of the Edinburgh Tram Network 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 any Successor Infraco shall, during any period when it or they have access to the Edinburgh Tram Network, comply with all Law applicable to working at those premises for the safety of persons and convenience of the public;

95.4.4 provide to **tie** and to any Successor Infraco such non-commercially sensitive information concerning the Edinburgh Tram Network and the Tram Maintenance Services and/or Infrastructure Maintenance Services which is reasonably required for the efficient transfer of responsibility for performance of the Tram Maintenance Services and/or Infrastructure Maintenance Services;

95.4.5 at the request of **tie** and/or the Successor Infraco, save where otherwise expressly provided for under this Agreement, provide the originals of such documentation within 14 Business Days of such termination or the Expiry Date and, so far as the Infraco is permitted use reasonable endeavours to, assign any sub-contracts, guarantees and/or warranties, on either the termination or expiry date save for in the case of termination for Infraco Default (b), in which event the Infraco agrees that an automatic assignation of all Key Subcontractor sub-contracts shall be effected by **tie**

giving written notice of assignation to every Key Subcontractor as provided for in the relevant Key Subcontractor collateral warranty;

95.4.6 allow, or procure that the Infraco Parties shall allow, **tie** and any Successor Infraco such access to any employees engaged by the Infraco or such Infraco Party in the provision of the Tram Maintenance Services and/or Infrastructure Maintenance Services as **tie** or such Successor Infraco shall reasonably require for the purpose of informing and consulting with such employees over the terms and conditions on which their employment will be transferred (to the extent this is the case) to **tie** or any Successor Infraco or sub-contractor engaged by the Successor Infraco; and

95.4.7 on request, make the Handback Package available to **tie** or any Successor Infraco.

95.5 The Infraco shall use reasonable endeavours to facilitate the transfer of responsibility for the Tram Maintenance Services and/or Infrastructure Maintenance Services to a Successor Infraco or to **tie**, as the case may be, and the Infraco shall take no action at any time which is calculated or intended to prejudice or frustrate or make more difficult such transfer. In particular, but without limitation to the generality of the foregoing, the Infraco shall, during the final twelve months of the Term (where this expires by effluxion of time) or during the period following service of a Termination Notice, and whilst the same remains outstanding:

95.5.1 without prejudice to Clause 52.12, not allow levels of stocks and Spare Parts, Special Tools and other spares to fall to the level which might reasonably be expected to prejudice the continuing efficient operation and maintenance of the Edinburgh Tram Network in accordance with Good Industry Practice; and

95.5.2 observe and perform the provisions of Clause 58 (*TUPE and Handover*).

95.6 As soon as reasonably practicable after service of a Termination Notice or at least 90 days prior to the Expiry Date, the Infraco shall, by notice in writing to **tie**, provide (or procure that the relevant Infraco Parties provide) to **tie** and any nominated Successor Infraco an inventory of all Spare Parts, Special Tools, other spares, consumables and other items used in the Maintenance Services which do not form part of the Edinburgh Tram Network and permit **tie** or any Successor Infraco to inspect and examine the same. The Infraco and **tie** shall seek to agree the price for the spares, consumables and other items transferred under this Clause 95.6 but in the event of failure to agree such a price the same shall be determined by reference to the Dispute Resolution Procedure. Following agreement or determination of a price the Infraco shall (or shall procure that the relevant Infraco Party which owns the same shall) with effect from the date of payment of such price transfer to **tie**, or as it may nominate in writing

to the Infraco, all such Spare Parts, Special Tools, and other spares, consumables and other items as may be specified by a notice in writing from **tie** to the Infraco (other than those consumed or used in the normal course of the Tram Maintenance Services and/or Infrastructure Maintenance Services prior to such transfer).

95.7 NOT USED

95.8 The Infraco shall, to the extent required by this Agreement, handover the Assets to CEC, **tie** or a Successor Infraco, such handover to be in a timely and orderly fashion so as to preserve the technical and commercial integrity and goodwill and value of the Edinburgh Tram Network and to enable an efficient handover of the Infraco Works and subject to Clause 95.6 and 95.9, shall not be entitled to any payment in respect of the handover or any relinquishment of licence to use the Assets or perform the Infraco Works.

95.9 **tie** may request to purchase any assets owned by the Infraco which have been used in the performance of the Infraco Works or used in relation to the Edinburgh Tram Network. If the Parties agree a fair market value for any such assets, **tie** shall pay the agreed sum to the Infraco and the Infraco shall deliver such assets to **tie** as soon as reasonably practicable.

96. SURVEYS PRIOR TO EXPIRY DATE

96.1 Without prejudice to Clause 55 (*Surveys of the Edinburgh Tram Network and Audits of Maintenance Procedures*) and Clause 95 (*Transition on Termination or Expiry*), at any time after the issue of the Reliability Certificate if **tie** reasonably believes that the Infraco is in breach of its obligations under Clause 52, **tie** shall be entitled to carry out or procure a survey from a professionally qualified, competent and skilled person experienced in carrying out surveys of a similar nature, scope and complexity to those being procured ("**Condition Survey**") of the Edinburgh Tram Network to assess to what extent it has been and is being maintained by the Infraco in accordance with this Agreement, and in particular under Clause 52 (*Maintenance*), Schedule Part 2 (*Employer's Requirements*), Schedule Part 21 (*Tram Maintenance Agreement*). Where such Condition Surveys will impact upon the Infrastructure Maintenance Services or require the assistance of the Infraco, such Condition Surveys shall be carried out no more frequently than once every quarter.

96.2 **tie** shall notify the Infraco in writing a minimum of 10 Business Days in advance of the date they wish to commence a Condition Survey (or elements of such survey). **tie** shall consider in good faith any reasonable written request by the Infraco for the relevant Condition Survey to be carried out on a different date or dates if such request is made at least 5 Business Days prior to the notified date and the Infraco (acting reasonably) is able to demonstrate that carrying out

the relevant Condition Survey on the notified date would materially prejudice the Infraco's ability to provide the Maintenance Services.

96.3 When carrying out a relevant Condition Survey, **tie** shall (or shall procure that the surveyor shall) use reasonable endeavours to minimise any disruption caused to the provision of the Maintenance Services by the Infraco. The Infraco shall afford **tie** and the surveyor (free of charge) any reasonable assistance required by **tie** and/or the surveyor during the carrying out of the relevant Condition Survey. Subject to Clause 96.4.2, the cost of a Condition Survey and of restoring any damage resulting from the carrying out of the Condition Survey shall be borne by **tie**.

96.4 If, in the reasonable opinion of **tie**, a Condition Survey shows that the Infraco has not complied with or is not complying with its obligations under Clause 52 (*Maintenance*) other than in respect of maintenance work scheduled in the Maintenance Plan:

96.4.1 the Parties shall meet to discuss the Condition Survey and agree the:

96.4.1.1 rectification and/or maintenance work required to bring the condition of the Edinburgh Tram Network to the standard it would have been in if the Infraco had complied or was complying with its obligations under this Agreement, in particular under Clause 52 (*Maintenance*) (the "**Required Condition**");

96.4.1.2 period within which the Infraco must carry out such rectification and/or maintenance work taking into account maintenance work scheduled in the Maintenance Plan other than where such work has been unreasonably deferred; and

96.4.1.3 the likely cost of carrying out such rectification and/or maintenance work,

provided that if the Parties cannot agree the Required Condition, the period within which such work should be carried out or the likely cost of carrying out such rectification and/or maintenance work either Party will be entitled to refer the matter for determination to the Dispute Resolution Procedure.

96.4.2 **tie** shall be entitled to recover the cost of the relevant Condition Survey from the Infraco as a debt where the Conditions Survey shows a material non-compliance with the Infraco's obligations under Clause 52 (*Maintenance*).

96.4.3 Where the cost of remedying any non-compliance as established pursuant to 96.4.1.3 is likely to exceed £50,000, **tie** shall be entitled to require that the Infraco shall provide

within 20 Business Days of a written request from **tie** either (at Infraco's option) a cash deposit or a bond (substantially in the form of part C of Schedule Part 8 equal the lesser of (i) the value of the rectification and/or maintenance works necessary to meet the Required Condition; and (ii) £1,000,000. In the event that, where required by **tie**, Infraco do not provide such bond or cash retention within 20 Business Days **tie** shall be entitled to exercise automatic withholding from payments to Infraco until such time as the monies withheld pursuant to this provision equal the lesser of (i) the value of the rectification and/or maintenance works necessary to meet the Required Condition; and (ii) £1,000,000. The proceeds of any bond, retention or cash deposit made pursuant to this Clause 96.4.3 shall not count towards the Liability Cap pursuant to Clause 77.7.

- 96.4.4 In the event that the value of the rectification and/or maintenance works as established pursuant to Clause 96.4.1.3 necessary to meet the Required Condition is likely to exceed £1,000,000 **tie** may request Infraco to extend the value of the bond or cash deposit put in place pursuant to Clause 96.4.3 beyond £1,000,000. Should Infraco refuse to increase the value of the bond or cash deposit pursuant to Clause 96.4.3 beyond £1,000,000, **tie** shall be entitled to treat such refusal as an Infraco Default.
- 96.5 The Infraco shall carry out such rectification and/or maintenance work as is necessary to meet the Required Condition within the period agreed pursuant to Clause 96.4.1.2 and any costs it incurs in carrying out such rectification and/or maintenance work shall be to its own expense.
- 96.6 Where it has been agreed between the Parties acting reasonably that the rectification and/or maintenance work necessary to meet the Required Condition has been carried out by the Infraco or **tie** then, as soon as practicable (and any event within 10 Business Days of the date on which all such work has been carried out) **tie** shall pay to the Infraco any credit balance remaining on the cash deposit or serve a notice on the Infraco confirming completion of the rectification or maintenance works and that any bond put in place pursuant to Clause 96.4.3 may be released.
- 96.7 If and to the extent that the Infraco fails to carry out the necessary rectification and/or maintenance work as is necessary to meet the Required Condition within the period agreed pursuant to Clause 96.4.1.2, **tie** shall be entitled to carry out or procure the carrying out of such rectification and/or maintenance work necessary to meet the Required Condition and may make withdrawals from the retention or deposit provided pursuant to Clause 96.4.3 or may call against the bond provided pursuant to Clause 96.4.3 to recover its reasonable and demonstrable costs in carrying out or procuring the carrying out of such works.

- 96.8 In the event that the value of the retention, deposit or bond is insufficient to cover **tie** carrying out or procuring the carrying out of such rectification and/or maintenance work necessary to meet the Return Condition, **tie** shall be entitled to recover such shortfall from the Infraco as a debt.

PART 17 - MISCELLANEOUS

97. DISPUTE RESOLUTION PROCEDURE

- 97.1 The Parties agree that any Dispute shall be dealt with in accordance with the provisions set out in Schedule Part 9 (*Dispute Resolution Procedure*).

98. ASSIGNATION, CHANGE IN LEGAL STATUS AND CHANGES IN CONTROL

- 98.1 Without prejudice to Clause 28 (*Sub-Letting and the Appointment of Sub-Contractors*), the Infraco shall not assign, novate or otherwise transfer the whole or any part of the Agreement without the prior written agreement of **tie** and CEC.

- 98.2 In addition to and without prejudice to Clause 11 (*Novation of the SDS Agreement to the Infraco*), Clause 12 (*Novation of the Tram Supply Agreement to the Infraco*) and Clause 13 (*Novation of the Tram Maintenance Agreement to the Infraco*) **tie** shall be entitled to assign, novate or otherwise transfer the whole or any part of this Agreement:

98.2.1 to the Scottish Ministers, CEC, or their statutory successors (enjoying full executive authority in their own right under public administrative law) in accordance with the Tram Legislation; or

98.2.2 NOT USED

98.2.3

(a) to TEL;

(b) or to any other person

in accordance with the Tram Legislation, and whose obligations under this Agreement are in both cases irrevocably guaranteed (in a form reasonably acceptable to the Infraco acting reasonably) by CEC or the Scottish Ministers; or

98.2.4 with the prior written consent of each Infraco Member, such consent shall be deemed not to be unreasonably withheld if the reason for withholding is an objection to the assignee from any of the Infraco's sureties pursuant to Clause 74.

99. NOT USED

100. SECURITY INTERESTS

100.1 The Infraco shall not create or agree to create any Security Interest over the Edinburgh Tram Network or part thereof or any Assets owned by **tie** or CEC or over this Agreement.

100.2 The Infraco shall not dispose of any right in respect of or interest in any Asset used in the Infraco Works or relating to the Edinburgh Tram Network if to do so would have a material adverse effect upon either the Edinburgh Tram Network, the rights in the Assets held by CEC, or the position of **tie** under this Agreement, whether or not this Agreement has terminated or expired provided always that restrictions in this Clause 100 (*Security Interests*) shall not apply in the case of:

100.2.1 disposals of redundant or obsolete Assets not required for the Edinburgh Tram Network provided that **tie** has procured CEC consent to such disposal, and CEC receives any proceeds associated with such disposal; or

100.2.2 disposals of property or assets where such property or assets are replaced by other property or assets comparable or superior as to type and function.

101. CONFIDENTIAL INFORMATION

101.1 Each Party:

101.1.1 shall treat all Confidential Information belonging to the other Party as confidential and safeguard it accordingly; and

101.1.2 shall not disclose any Confidential Information belonging to the other Party to any other person without the prior written consent of the other Party, except to such person and to such extent as may be necessary for the performance of this Agreement or except where disclosure is otherwise expressly permitted by the provisions of this Agreement.

101.2 Each Party shall take all necessary precautions to ensure that all Confidential Information obtained from the other Party under or in connection with the Agreement:

101.2.1 is given only to such of the staff, contractors, agents, subcontractors, consultants and professional advisors engaged by it in connection with this Agreement as is strictly necessary for the carrying out by that Party of its obligations under this Agreement; and

101.2.2 is treated as confidential and not disclosed (without prior approval) or used by any such staff, contractors, agents, subcontractors, consultants and professional advisors otherwise than for the purposes of this Agreement.

101.3 Where it is considered necessary in the opinion of the owner of the Confidential Information, the other Party shall ensure that its staff, contractors, agents, subcontractors, consultants and professional advisors sign a confidentiality undertaking before commencing work in connection with this Agreement.

101.4 Neither Party shall use any Confidential Information it receives from the other Party otherwise than for the purposes of this Agreement.

101.5 The provisions of Clauses 101.1 to 101.4 shall not apply to:

101.5.1 any information which is or becomes public knowledge (otherwise than by breach of this Clause 101 (*Confidential Information*));

101.5.2 any information which was in the possession of the receiving Party, without restriction as to its disclosure, before receiving it from the disclosing Party;

101.5.3 any information which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

101.5.4 any information which is independently developed without access to the Confidential Information;

101.5.5 any disclosure pursuant to a statutory, legal or parliamentary obligation placed upon the Party making the disclosure, including any requirements for disclosure under FOISA, the Code, or the Environmental Information Regulations pursuant to Clauses 101.7 to 101.11 (inclusive);

101.5.6 NOT USED

101.5.7 any information which is required to be disclosed to that Party's insurers, financial advisers and/or legal advisers subject to Clauses 101.2 and 101.3;

101.5.8 any registration of information in respect of the Consents and any property registration required;

101.5.9 any disclosure of information by **tie** to TEL, CEC, any department, office or agency of the Scottish Executive, the Scottish Ministers, Transport Scotland, Partnerships UK Limited or the UK government where such Confidential Information is required to be disclosed by Law or where the disclosing Party, acting reasonably, needs to disclose such information in order to comply with the provisions of this Agreement;

101.5.10 NOT USED

101.5.11 any disclosure of Confidential Information obtained from the Infraco to any government department or any other local government authority or public authority equivalent in status to **tie** where such Confidential Information is required to be disclosed by Law or where the disclosing Party, acting reasonably, needs to disclose such information in order to comply with the provisions of this Agreement. All government departments or any other local government authority or public authority equivalent in status to **tie** receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments or any other local government authority or public authority equivalent in status to **tie** on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any government department or any other local government authority or public authority equivalent in status to **tie** provided that in disclosing information under this Clause 101 (*Confidential Information*) **tie** discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate,

provided that in disclosing information under this Clause 101 (*Confidential Information*) **tie** discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate. **tie** shall be responsible to the Infraco for any abuse by the recipient in breach of such confidentiality obligation.

101.6 Nothing in this Clause 101 (*Confidential Information*) shall prevent either Party from using any techniques, ideas or know-how gained during the performance of this Agreement in the course of its normal business, to the extent that this does not result in a disclosure of Confidential Information or an infringement of Intellectual Property Rights including those rights expressed in Clause 102 (*Copyright and Intellectual Property*).

101.7 The Infraco acknowledges that **tie** is subject to the requirements of FOISA and the Environmental Information Regulations and shall assist and cooperate with **tie** (at **tie's** expense) to enable **tie** to comply with any Information disclosure requirements in relation to this Agreement. **tie** agrees that it shall comply with the terms of the Code in respect of the discharge of its obligations under FOISA.

101.8 The Infraco shall, and shall procure that the Infraco Parties shall:

101.8.1 transfer any Request for Information to **tie** as soon as practicable after receipt and in any event within 5 Business Days of receiving any Request for Information;

101.8.2 provide all reasonable assistance requested by **tie**, at **tie's** cost, in order to support **tie** and CEC with regard to any requirement from Scottish Ministers regarding their obligations pursuant to the Code;

101.8.3 provide all necessary assistance as reasonably requested by **tie** to enable **tie** to respond to a Request for Information relating to this Agreement within the time for compliance set out in section 10 of FOISA or regulation 5 of the Environmental Information Regulations.

101.9 **tie** shall be responsible for determining at its absolute discretion whether the Confidential Information and/or any other Information:

101.9.1 is exempt from disclosure in accordance with the provisions of the Code, FOISA or the Environmental Information Regulations; and

101.9.2 is to be disclosed in response to a Request for Information,

save that, where any Request for Information relates to Confidential Information disclosed by the Infraco under this Agreement, **tie** shall, where practicable, in advance of making any disclosure under FOISA or the Environmental Information Regulations notify the Infraco of such request and consult with the Infraco regarding all reasonable representations by the Infraco that such Confidential Information is exempt information.

101.10 In no event shall the Infraco respond directly to a Request for Information unless expressly authorised to do so by **tie**.

101.11 The Infraco acknowledges that **tie** may be obliged, pursuant to the Code, FOISA, or the Environmental Information Regulations to disclose Information:

101.11.1 without consulting with the Infraco; or

101.11.2 following consultation with the Infraco and having taken its views into account.

101.12 NOT USED

101.13 The Infraco acknowledges that any lists or schedules provided by it outlining Confidential Information are of indicative value only and that **tie** may nevertheless be obliged to disclose Confidential Information in accordance with Clause 101.7.

101.14 Any public relations material, press releases, public presentations or conference engagements in relation to this Agreement planned by the Infraco requires **tie's** prior written approval.

101.15 If a Party becomes required in circumstances contemplated by clauses 101.5.5, 101.5.9, 101.5.10 or 101.5.11 to disclose any Confidential Information, such Party shall give to the Party which owns such Confidential Information as much notice as is practical in the circumstances of such disclosure and shall co-operate with that other Party, having due regard to the other Party's views, and take such steps as the other Party may reasonably require in order to enable it to mitigate the effect of, or avoid the requirements for, any such disclosure.

102. COPYRIGHT AND INTELLECTUAL PROPERTY

102.1 All the Infraco IPR shall be owned by the Infraco and/or the Infraco Parties at all times.

102.2 The Infraco hereby:

102.2.1 assigns by way of future assignation to **tie** with full title guarantee the Project IPR which is created by it and used by the Infraco to carry out its obligations under this Agreement for all purposes for all of the residue of the term of such Intellectual Property Rights and all renewals or extensions thereof and together with all accrued causes of action in respect thereof, provided that **tie** shall grant a non-exclusive, perpetual, transferable and royalty-free licence in such Project IPR to the Infraco to use, have used and sublicense such Project IPR without any restriction.

102.2.2 grants to **tie** a non-exclusive perpetual irrevocable royalty free licence to use such Infraco IPR which is contained in the Deliverables as may be necessary for **tie** to use in relation to the Infraco Works and the Maintenance Services and any extension of the Edinburgh Tram Network and undertakes to procure for **tie** a licence on the same terms as above in respect of any Project IPR created by the Infraco Parties.

102.2.3 grants to **tie**, with the prior written consent of the Infraco such consent not to be unreasonably withheld, the right to grant non-exclusive non-assignable sub-licences to third parties for such periods of time as **tie** may reasonably require and otherwise on the same terms as the licence granted to **tie** pursuant to Clause 102.2.2 above, to use the Infraco IPR referred to in that clause (other than in relation to Third Party Software and commercially available software which is subject to the provisions of Clause 102.9) in so far as is necessary or desirable for such third party to use such Infraco IPR in relation to the Infraco Works for the Edinburgh Tram Network, the Maintenance Services and any extension of the Edinburgh Tram Network.

102.2.4 **tie** acknowledges that the rights in and title to Project IPR created by the Infraco Parties shall remain vested in those parties.

102.3 For the avoidance of doubt, the persons to whom **tie** may grant sub-licences pursuant to Clause 102.2.3 above shall include:

102.3.1 any **tie** Party;

102.3.2 CEC and TEL;

102.3.3 the Operator and any party other than the Operator providing support to **tie** in relation to the Infraco Works, the Maintenance Services and the Edinburgh Tram Network;

102.3.4 any Successor Infraco and any party providing maintenance in relation to the Infraco Works and the Edinburgh Tram Network; and

102.3.5 any permitted assignee or transferee under this Agreement.

102.4 **tie** shall not exercise any of the rights licensed to it pursuant to this Clause 102 to design, construct, manufacture or commission or procure the same:

102.4.1 unless and until **tie** and the Infraco cannot agree a price and/or delivery time in relation to a Spare Part or Special Tool; or

102.4.2 unless a notice pursuant to Clause 12.8 has been served by the Infraco; or

102.4.3 unless **tie** has served a Final Persistent Breach Notice caused by the Tram Supplier.

102.5 The copyright of this Agreement and any data or software supplied to the Infraco by **tie**, shall remain solely with **tie**.

- 102.6 The Infraco shall at any time and from time to time hereafter at the request of **tie**, execute all such documents and do all such further acts as may be required in order to vest the rights referred to in Clause 102.2.1 in **tie**.
- 102.7 The Infraco waives any and all moral rights held or to be held by the Infraco in the Deliverables (save in relation to Infraco IPR contained in them) and the Project IPR assigned to **tie**.
- 102.8 **tie** shall not be entitled to adapt, reverse engineer, decompile, disassemble and/or modify the Tram Software in whole or in part except:
- 102.8.1 as permitted by Law; or
- 102.8.2 to the extent that such action is legitimately required for the purposes of integrating the operation of the Tram Software with the operation of other software or systems used by **tie** or **tie** Parties in connection with the Edinburgh Tram Network.
- 102.9 To the extent that any of the Deliverables are generated by or maintained on a computer or similar system, the Infraco shall use reasonable endeavours to procure for the benefit of **tie**, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant Third Party Software (other than any commercially available standard software) on the same terms as the Infraco Software is licensed to **tie**, to enable **tie** or its nominee to access and otherwise use (subject to the payment by **tie** of the relevant fee, if any) such Deliverables in connection with this Agreement. As an alternative, the Infraco may provide such Deliverables in a format which may be read by software generally available at reasonable prices in the market at the relevant time or in hard copy format. The Infraco shall obtain for **tie** the right to use commercially generally available (standard) software incorporated into or used in the Infraco Works and provided as Deliverables on the standard licence terms granted with such software.
- 102.10 The Infraco shall ensure the back-up and storage in safe custody of the Deliverables in accordance with Good Industry Practice, as agreed with **tie** in advance, such agreement not to be unreasonably withheld or delayed.
- 102.11 For the purposes of this Clause 102 (*Copyright and Intellectual Property*), "use" shall include the acts of copying, modifying, adapting or translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed

accordingly. The Infraco shall not be liable or responsible for any modifications or adaptations made by **tie** or its licencees.

102.12 The provisions of this Clause 102 (*Copyright and Intellectual Property*) shall apply during the continuance of this Agreement and after its termination howsoever arising, and immediately following termination howsoever arising, the Infraco shall provide **tie** with:

102.12.1 a copy of the object code for the Third Party Software and the Infraco Software on media that is acceptable to **tie** (acting reasonably);

102.12.2 a copy of the source code for the Specially Written Software on media that is acceptable to **tie** (acting reasonably); and

102.12.3 a copy of all documentation, manuals and other technical information relating to the Third Party Software, the Specially Written Software and the Infraco Software that is reasonably required by **tie** to operate, manage and support the Third Party Software, the Specially Written Software and the Infraco Software.

102.13 The Infraco shall not publish any document or matter relating to the Infraco Works or this Agreement, either alone or in association with any other body or person, without the prior written consent of **tie**, which consent shall not be withheld unreasonably.

Software

102.14 In designing and creating Infraco Software forming part of the Deliverables, the Infraco shall ensure:

- (a) that orderly auditable records of the progress of the development of the Infraco Software from the functional requirements to the final code are maintained, and that regular verification and testing occurs at each stage of the design process;
- (b) that it shall produce, during the development of the Infraco Software comprehensive and accurate documentation including specifications, cause and effect charts and flowcharts are produced;
- (c) that the documentation, access rights, details of configuration software and the like produced in accordance with (a) above, is such as to enable an appropriately qualified independent auditor (who is not involved in the original design) to:
 - (i) relate the Infraco Software to the performance of the relevant equipment under normal and fault conditions;

- (ii) to verify its compliance with the functional requirements of that equipment;
- (iii) to operate and reconfigure the Software without the assistance of the Infraco;
and
- (d) that the Infraco Software is designed, developed and documented following an industry-recognised standard, using recognised quality control methods.

102.15 Subject to the terms of any Third Party Software Licences, the Infraco shall to a reasonable extent, create or provide:

- (a) coding and documentation, in machine readable form, of the final structure of the Infraco Software, and of the intermediate stages leading to it (i.e. source and object codes); and
- (b) where **tie** so instructs, usable copies of any ancillary computer programs used to generate the code (such as compilers) provided that **tie** meet the costs of any additional Third Party Software Licences.

102.16 Where the Infraco is required to provide Infraco Software as part of a Deliverable under this Agreement it shall, within thirty (30) days of acceptance of the Infraco Software by **tie** place, or shall procure the placement of, a copy of the source code of the Infraco Software in escrow with the NCC Group of Manchester Technology Centre, Oxford Road, Manchester ("NCC") or such other escrow agent as the Parties may agree. The Parties shall enter into NCC's standard escrow agreement (provided that, in the case of Third Party Software, the Infraco shall procure that the owner of such software enters into such escrow agreement) for a single licensee (or if no such agreement exists, the appropriate standard agreement as stipulated by NCC). The cost of such source code deposit (including all renewal costs) shall be payable by Infraco.

Technical Library

102.17 The Infraco shall;

- (a) as soon as reasonably practicable establish a secure, virtual electronic site for the storage of Deliverables other than the source code (the "**Technical Library**"). Such electronic site shall be capable of being accessed through a standard web browser. At **tie's** request, the Infraco will in addition also establish a physical site with paper copies of the Technical Library;

- (b) as and when Deliverables (other than the source code) are produced or updated from time to time:
 - (i) where such Deliverables are produced or updated by the Infraco, promptly ensure that a copy of those Deliverables or its updated version is placed in the Technical Library; and
 - (ii) where such Deliverables are produced or updated by any Subcontractor, as soon as reasonably practical ensure that a copy of those Deliverables or their updated version(s) are placed in the Technical Library;
- (c) establish an index, in a format approved by **tie**, of all Deliverables deposited in the Technical Library from time to time and update that index whenever any such Deliverables are deposited in the Technical Library;
- (d) deliver one copy of the index and each update established under clause 102.17(c) to **tie**; and
- (e) permit **tie** (or its nominee) to have access to the Technical Library from time to time during normal business hours, and following reasonable notice from **tie** (or its nominee) to the Infraco, for the purpose only of auditing its contents against the current index.

102.18 Within three Business Days of the earlier of the issue of the Reliability Certificate pursuant to Clause 47.4 or the termination of this Agreement, the Infraco shall hand over the Technical Library, and the secure access to it, to **tie** and the Infraco's obligations in relation to the further maintenance of the Technical Library shall cease. Should an audit of the contents of the Technical Library against the current index reveal that the index does not contain details of categories or types of Deliverables which should be contained within the Technical Library, **tie** may request and the Infraco grants access to **tie** to the Technical Library from time to time during business hours in order to audit the contents of the Technical Library to determine whether such categories and types of Deliverables are in fact contained within the Technical Library. Any such request shall be made with reasonable notice and shall indicate with reasonable clarity the Technical Information or the type of Deliverable which is required for review.

102.19 In relation to Tramco IPR and Tramco Project IPR, the provisions of Schedule Part 39 shall apply.

103. DATA PROTECTION

103.1 For the purpose of the following clauses, the term "**personal data**" shall have the meaning given to it in the Data Protection Act 1998.

103.2 The Infraco shall, in relation to any personal data relating to the performance of the Infraco Works in respect of which it is either the "data controller" or the "data processor" for the purposes of the Data Protection Act 1998, comply with the obligations of a "data controller" under the provisions of the seventh data protection principle as set out in Schedule 1 of that Act. In addition, the Infraco:

103.2.1 shall have at all material times (and shall use its reasonable endeavours to procure that all the Infraco Parties have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it;

103.2.2 shall (and shall use its reasonable endeavours to procure that the Infraco Parties shall) take at all material times, all reasonable steps to ensure the integrity of any of its staff with access to personal data processed in connection with the Infraco Works;

103.2.3 shall act only on the instructions of **tie** in relation to the processing of any personal data in respect of which **tie** is the "data controller" for the purposes of that Act;

103.2.4 shall only obtain, hold, process, use, store and disclose such personal data as is necessary to perform its obligations under this Agreement; and

103.2.5 shall allow **tie** access to any relevant premises on reasonable notice to inspect its procedures referred to in Clause 103.2.1.

104. INFORMATION AND AUDIT ACCESS

104.1 The Infraco shall, in accordance with Good Industry Practice, keep and maintain:

104.1.1 all Deliverables;

104.1.2 all invoices, timesheets and expense claims for which the Infraco has sought or is seeking reimbursement under the provisions of this Agreement;

and shall keep the above items for at least six years following expiry or termination of this Agreement.

- 104.2 The items referred to in Clause 104.1 shall be kept in good order and in such form so as to be capable of audit (including by electronic means) by **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors or any other third party. The Infraco shall make such records available for inspection by or on behalf of **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors or any other third party at all reasonable times during normal working hours on not less than one Business Day's notice. Save where an Infraco Default has occurred and is continuing, the frequency of any audit or inspection pursuant to this Clause 104 shall be reasonable and **tie** shall, and shall procure that **tie's** Representative and any other agents or representatives shall, during any period when it or they have access to any premises of the Infraco or any Infraco Party, comply with all rules and regulations notified to **tie** applicable to working at those premises for the safety of persons and convenience of the public.
- 104.3 In addition to the requirements of Clause 104.1 and 104.2, the Infraco shall provide to **tie's** Representative, **tie**, CEC, **tie's** auditors, CEC's auditors or their successors, any other information, documents, records and the like in the possession of, or available to the Infraco (and to this end, the Infraco shall use all reasonable endeavours to procure that all such items in the possession of the Infraco Parties shall be available to it) as may be reasonably requested by **tie's** Representative, **tie**, CEC, **tie's** auditors or CEC's auditors for any purpose in connection with this Agreement and/or the Infraco Works.
- 104.4 The Infraco shall provide and shall procure that the Infraco Parties shall provide such assistance as **tie** may reasonably require from time to time, to enable **tie** and CEC to meet their obligations to provide reports and returns pursuant to Law, directions and guidance applicable to the passenger transport sector, and to carry out audits.
- 104.5 The Infraco shall comply, at its own cost, with any reasonable request by **tie** in respect of the recording, storage, keeping, disclosure, organisation, use, processing, dissemination, deletion or destruction of any records, data or information obtained by the Infraco as a result of carrying out the Infraco Works in so far as is in accordance with the HSQE System.
- 104.6 **tie** shall provide to the Infraco (subject to reasonable notice and relevant undertaking as to costs) such information within its possession or control with respect to the Edinburgh Tram Network as the Infraco may reasonably request to enable it to perform its obligations under this Agreement, provided that **tie** shall have no obligation to provide information with respect to which it is subject to an obligation of confidentiality (whether under any Law, at contract or otherwise).
- 104.7 The provisions of this Clause 104 (*Information and Audit Access*) shall apply during the continuance of this Agreement and after its expiry or termination howsoever arising.

105. HEALTH AND SAFETY, QUALITY ASSURANCE AND ENVIRONMENTAL MANAGEMENT SYSTEM

105.1 The Infraco shall operate:

105.1.1 a health and safety management system, the standard of which shall comply with OHSAS 18001 or HSG65;

105.1.2 a quality management system, the standard of which shall comply with BS EN ISO 9001:2000; and

105.1.3 an environmental management system, the standard of which shall comply with BS EN ISO 14001:2004;

which shall be known together as the "**HSQE System**".

105.2 The Infraco shall (and shall procure that the Infraco Parties) comply with the HSQE System and the Infraco shall develop appropriate management plans so as to ensure such compliance with the HSQE System.

105.3 If any Deliverable has not been prepared in accordance with the HSQE System, **tie's** Representative shall so inform the Infraco in writing giving reasons. If such non-compliance gives rise to a defect in the Infraco Works then the Infraco shall not be entitled to make any claim against **tie** for an extension of time or payment in respect of such defect.

105.4 Compliance with the HSQE System shall not relieve the Infraco from any of its other duties, obligations or liabilities under this Agreement.

105.5 The Infraco shall appoint (or shall procure the appointment of) an HSQE Manager as soon as reasonably practicable following the Effective Date. The identity of the HSQE Manager (and any replacement) shall be subject to the approval of **tie's** Representative (such approval not to be unreasonably withheld or delayed).

105.6 The HSQE Manager shall:

105.6.1 ensure the effective operation of the HSQE System described in this Clause 105 (*Health and Safety, Quality Assurance and Environmental System*);

105.6.2 audit the HSQE System at regular intervals and report the findings of such audit to **tie's** Representative;

105.6.3 review the HSQE System at intervals agreed with **tie's** Representative to ensure its continued suitability and effectiveness; and

105.6.4 liaise with **tie's** Representative on all matters relating to the HSQE System.

106. ENTIRE AGREEMENT

106.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings including the PB Agreement, Weisbaden Agreement and Rutland Square Agreement and the 9th May 2008 Agreement, concerning the subject matter of this Agreement.

106.2 Each of the Parties confirms to the other that it has neither been induced to enter into this Agreement in reliance on, nor has it made, any representation or warranty except those contained or referred to in this Agreement.

106.3 Any representations or warranties other than those contained or referred to in this Agreement are superseded and extinguished by this Agreement.

106.4 The Parties agree that the PB Agreement, Weisbaden Agreement and Rutland Square Agreement and the 9th May 2008 Agreement shall terminate forthwith on the Commencement Date and neither Party shall have any liability in respect thereof from the date of such termination.

106.5 Each Party irrevocably and unconditionally waives all rights and remedies which it might otherwise have had in relation to any representations or warranties other than those contained or referred to in this Agreement save in respect of any fraudulent misrepresentation.

107. FURTHER ASSURANCE

107.1 Each Party shall at the reasonable request and cost of the other (save where it is expressly provided that the cost of such act or execution shall be for that Party's account) do any act or execute any document that may be necessary to give full effect to this Agreement.

108. VARIATIONS TO BE IN WRITING

108.1 No variation or alteration of any of the provisions of this Agreement shall be effective unless it is in writing and signed by both Parties.

109. WAIVERS

109.1 Save where expressly stated, no failure or delay by either Party to exercise any right or remedy in connection with this Agreement will operate as a waiver of it or of any other right or remedy nor will any single or partial exercise preclude any further exercise of the same, or of some other right or remedy. A waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

109.2 The Parties agree that no waiver shall occur or be deemed to have occurred unless or until clear and unequivocal express waiver of a clearly identified default is contained in a written notice by the waiving Party to the other Party expressly for the purpose of effecting such waiver.

109.3 The Parties' rights and remedies under this Agreement are, except where provided otherwise in this Agreement, independent, cumulative and do not operate to exclude one another or any rights or remedies provided by Law.

110. NO PARTNERSHIP OR AGENCY

110.1 Nothing in this Agreement shall be construed as creating a partnership between **tie** and the Infraco.

110.2 The Infraco shall not (and shall procure that the Infraco Parties shall not) act or purport to act as agent for **tie** in relation to any matter unless specifically authorised in writing under this Agreement by **tie**. The Infraco shall not be entitled to bind **tie** in any way or to create any liability or cause of action against **tie** and shall not hold itself out (and shall procure that no Infraco Party shall hold itself out) as having any such authority or power.

111. NOTICES

111.1 Any notice or notification required or authorised to be given under this Agreement by one Party to the other shall be:

111.1.1 in writing;

111.1.2 sent by one of the following methods:

111.1.2.1 pre-paid special or recorded delivery post or facsimile transmission
addressed to the Party to which it is given at:

- (i) in the case of notices given to **tie**: **tie** Limited, Citypoint, 65 Haymarket Terrace, Edinburgh, EH12 5HD, fax number 0131 622 8301 for the attention of: Tram Project Director, or such other address or fax number in the United Kingdom as **tie** may notify the Infraco from time to time for that purpose; or
 - (ii) in the case of notices given to the Infraco: Bilfinger Berger - Siemens Consortium, Lochside House, 3 Lochside Way, Edinburgh Park, Edinburgh EH12 9DT, fax number 0131 452 2518, for the attention of Scott McFadzen, or such other address or fax number in the United Kingdom as the Infraco may notify **tie** from time to time for that purpose; or
- 111.1.2.2 facsimile transmission addressed to the **tie's** Representative or the Infraco's Representative (as appropriate) at a facsimile number notified to the giving Party by the receiving Party for the service of notices under this Agreement from time to time; or
- 111.1.2.3 personal delivery into the hands of:
- (i) in the case of notices given to **tie**, **tie's** Representative; or
 - (ii) in the case of notices given to the Infraco, the Infraco Representative;
- 111.1.3 be deemed duly served:
- 111.1.3.1 if sent by pre-paid special or recorded delivery post on proof of delivery; or
 - 111.1.3.2 if sent via facsimile transmission or personal delivery, on the day of issue of the relevant fax confirmation receipt or such personal delivery (as appropriate), unless that day is not a Business Day or such delivery or transmission is made after 5:00pm on a Business Day in which case it shall be deemed duly served on the next Business Day thereafter.

112. INVALID TERMS

112.1 If any term of this Agreement shall be held to any extent to be invalid, unlawful or unenforceable:

112.1.1 that term shall, to that extent, be deemed not to form part of this Agreement; and

112.1.2 the validity and enforceability of the remainder of this Agreement shall not be affected.

112.2 Without prejudice to any other terms of this Agreement, the Parties shall promptly consult in good faith with a view to agreeing as soon as reasonably practicable one or more provisions in lieu of the invalid provision such as will, so far as is possible under any applicable Law, have the same commercial effect as the invalid provision would have had if it had not been unlawful, unenforceable or invalid.

113. THIRD PARTIES RIGHTS

113.1 It is expressly declared that no rights shall be conferred under this Agreement upon any person other than the Infraco, **tie** and, pursuant to Clause 9 (*Title*), Clause 77 (*Indemnity By Infraco, Liability and Sole Remedy*) and Clause 98 (*Assignment, Change in Legal Status and Changes in Control*), CEC and, in the case of Clause 77, the Indemnified Parties (other than CEC and **tie**). There shall not be created by this Agreement a jus quaesitum tertio in favour of any party whatsoever save for CEC by virtue of Clause 9 (*Title*) and Clause 20.14. For the avoidance of doubt, any Indemnified Party who is an officer, agent or employee of **tie** or CEC shall only be entitled to assert this entitlement through **tie** or CEC.

114. CONSENT AND APPROVAL

114.1 The giving of any consent or approval by or on behalf of **tie** shall not in any way relieve the Infraco of any of its obligations under this Agreement or of its duty to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the consent or approval.

114.2 Failure by **tie** to disapprove or object to any matter or thing shall not prejudice its power subsequently to take action under this Agreement in connection therewith, save where such disapproval or objection is to be made pursuant to Clause 12.8, Clause 13.8, Clause 41 (*Completion of Construction Milestones and Critical Milestones*), Clause 64 (*Relief Events*), Clause 65 (*Compensation Events*), Clause 80 (*tie Changes*) or Clause 90 (*Termination for Infraco Default*).

115. DISCRIMINATION

115.1 The Infraco shall not (and the Infraco shall insert a clause to this effect in each contract with any Infraco Party) unlawfully discriminate within the meaning and scope of the provisions of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003.

116. DEROGATIONS

116.1 The Infraco shall not, without the prior written consent of **tie** (acting reasonably), apply for any exemption or derogation from or dispensation under any applicable Law which would otherwise apply to the Infraco Works and including, without limitation, any exemption order under Section 47(3) of the Disability Discrimination Act 1995 or dispensations under the provisions of Section 10 of the Railways and Other Passenger Transport Systems (Approval of Works, Plant and Equipment) Regulations 1994 or any provisions which may replace, modify or supersede such provisions.

117. APPLICABLE LAW

117.1 This Agreement, any document completed or to be a completed in accordance with its provisions and any matter arising from this Agreement or any such document shall be governed by and construed in accordance with Scots law.

117.2 Subject to Clause 97 (*Dispute Resolution Procedure*), the Parties hereby irrevocably submit to the exclusive jurisdiction of the Court of Session in relation to this Agreement, any such document and any such matter.

118. DUTY TO ACT REASONABLY

118.1 Wherever in this Agreement a Party is required to make any determination or to give any decisions, instructions, opinions or consents or to express satisfaction or approval or otherwise take any action, that Party shall act fairly and reasonably within the terms of this Agreement (save where this Agreement expressly states that **tie** is to have absolute discretion), and having regard to all the circumstances.

119. MITIGATION

119.1 In all cases where a Party seeks to establish or alleges a breach of this Agreement or a right to be indemnified or compensated or to be awarded costs in accordance with this Agreement, that Party shall be under a duty to take all reasonable measures to mitigate the loss which has occurred.

120. JOINT AND SEVERAL LIABILITY

120.1 Each Infraco Member enters into this Agreement on the basis of joint and several liability for the performance and discharge of all obligations, save for Clause 75 (*Warranties*) (but not including Clause 75.1.7), arising from or in connection with the Agreement.

121. NO DOUBLE RECOVERY

121.1 Neither Party to this Agreement shall:

121.1.1 be entitled to recover any amount from the other under this Agreement to the extent that it has previously recovered for the same loss or damage under the terms of this Agreement or otherwise; or

121.1.2 claim or purport to claim for the same loss or damage under more than one provision of this Agreement.

IN WITNESS WHEREOF these presents on this and the preceding 236 pages together with Schedule in Fourty Four parts (inclusive) which is annexed and signed as relative hereto are executed as follows:

EXECUTED for and on behalf of **TIE LIMITED** at Edinburgh on ~~13~~ ¹⁴ May 2008 by:


Authorised Signatory

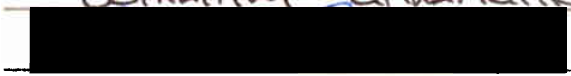
Full Name

Witness Signature

Full Name

Address



WILLIAM CALLAGHER


JAMES M^C EWAN

CITYPOINT, 65 HAYMARKET
TERRACE

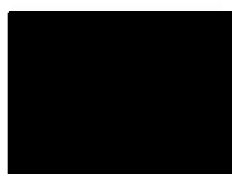
EXECUTED for and on behalf of **BILFINGER BERGER UK LIMITED** at Edinburgh on ~~13~~ ¹⁴ May 2008 by:


Director

Full Name

Director

Full Name



Richard John Wainon


GARY STEVE DARTON

EXECUTED for and on behalf of **SIEMENS**
PLC at Edinburgh on 13th May 2008 by:

14

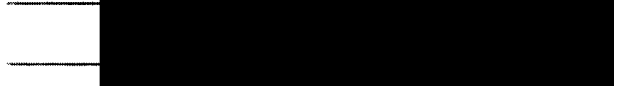


Authorised Signatory

Full Name

1. KOTH

Authorised Signatory



Full Name

MICHAEL FLYNN

**THIS IS SCHEDULE PART 1 REFERRED TO IN THE FOREGOING AGREEMENT
BETWEEN TIE AND THE INFRACO**

**SCHEDULE PART 1
DEFINITIONS AND INTERPRETATION**

1. Unless otherwise defined in this Agreement (including the recitals and the Schedules), save as the context otherwise requires, the following words and expressions shall have the meanings hereby ascribed to them:

"**Abortive Work**" means any work which cannot be used in relation to the Edinburgh Tram Network (but not including work occurring as part of the iterative process of design);

"**Access Permit**" has the meaning given in paragraph 3.4.1 of part A of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*);

"**Access Permit Form**" has the meaning given in paragraph 3.4.2 of part A of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*);

"**Accommodation Works**" means any works arising out of the compulsory purchase process (including the reinstatement of boundary walls, fences) or any other works **tie** are obliged to procure are carried out for third parties associated with the Edinburgh Tram Network

"**Accommodation Works Change**" means any Accommodation Works instructed by **tie** in accordance with Clause 83 (*Accommodation Works*) or which Infraco is required to carry out in accordance with Clause 18.17A.2;

"**Accommodation Works Notice**" has the meaning given in Clause 83 (*Accommodation Work Changes*);

"**Actual Milestone Date**" means the date on which a certificate in respect of a Milestone is issued in accordance with this Agreement;

"**Additional Available Infrastructure**" and "**Additional Available Tram**" means such level of additional availability which **tie** notifies to the Infraco pursuant to Clause 52.24 which is outwith the required Available Infrastructure and Available Tram and which is confirmed by the Infraco pursuant to Clause 52.24.

"**Additional Insurance**" has the meaning given in Clause 76.20;

"**Affected Party**" means a Party that is unable to comply with all or a material part of its obligations under this Agreement as a direct result of a Force Majeure Event;

"**Affiliates**" means, in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and "holding company" and "subsidiary" shall have the meaning given to them in section 736 of the Companies Act 1985 and its equivalent under the laws of the Federal Republic of Germany and the laws of Spain;

"**Agreement**" means Clauses 1 to 121 (inclusive) together with the Schedule in 44 Parts annexed thereto as may be amended from time to time in accordance with its terms;

"**Annual Service Report**" has the meaning given to it in Clause 73.4;

"**Application for Milestone Payment**" means the applications for payment from the Infraco to **tie** in respect of specific identified Milestones and specific identified Critical Milestones. Such applications for payment together with specific identified Milestones and Critical Milestones are set out for each Reporting Period in Schedule Part 5 (*Milestone Payments*);

"**Approval Bodies**" means any government agency or department, official or public statutory person, utilities, planning authorities, roads authorities, HMRI, HSE, Independent Competent Persons, BAA/EAL, Network Rail, SEPA, SNH, ORR, Historic Scotland, CAA and any other third parties who are to issue or provide Consents which may be required for the design, construction, installation, testing, commissioning, completion, opening, operation, maintenance, use or modification of the Edinburgh Tram Network;

"**Assets**" means all assets and rights to enable **tie**, CEC, TEL or their assignees or agents to own, operate, maintain and extend the Edinburgh Tram Network, including:

- (a) any materials and equipment forming part of the Edinburgh Tram Network;
- (b) any books and records (including the Operating and Maintenance Manual, health and safety manuals and other know how contained within the Project IPR and the Infraco IPR);and
- (c) any Trams, Spare Parts, Special Tools and other assets (together with any warranties in respect of assets being transferred);

but excluding any assets and rights in respect of which **tie** or CEC is full, legal and beneficial owner by virtue of Clause 9 (*Title*);

"**Asset Management System**" means the asset maintenance management and recording system described in Schedule Part 2 (*Employer's Requirements*);

"**Asset Protection Agreement**" means the agreement set out in Schedule Part 27 (*Asset Protection Agreement and Bridge Agreement*);

"**Available Infrastructure**" means that the Edinburgh Tram Network is fully functional each Operating Day from half an hour before the First Tram is scheduled to leave the Depot until half an hour after the Last Tram is scheduled to return to the Depot, compliant in all material respects with the Employer's Requirements save for any defects to the infrastructure of the Edinburgh Tram Network that will not affect the safety or quality of operation of the Edinburgh Tram Network or its compliance with the Disability Discrimination Act 1995 that has been advised to the Infraco and which does not constitute a restriction in the manner in which the Edinburgh Tram Network is to be operated;

"**Available Tram**" means a Tram that (i) fully complies with the Tram Maintenance Specification, save for Minor Defects (as defined in the Tram Maintenance Agreement), and (ii) is free from Material Defects (as defined in the Tram Maintenance Agreement);

"**BAA**" means BAA plc, a company incorporated under the Companies Act with registration number 1970855 and having its registered office at 130 Wilton Road, London, SW1V 1LQ which expression shall include its successors in title and assignees and any of its associated or subsidiary companies with interests at Edinburgh International Airport;

"**Background Information**" means all and any materials, documents, drawings, plans or other information in paper, electronic or any other form, relating in any way to this Agreement or the Tram Legislation (and the parliamentary process) and made available to the Infraco by **tie**, CEC and/or any of their respective members, officers, agents and/or advisers during the procurement competition relative to this Agreement or thereafter including the Ground Condition Information;

"**Base Case RPIX**" means RPIX as at 1 September 2007;

"**BT**" means British Telecommunications PLC, a company incorporated under the Companies Act with registered number 01800000 and having its registered office at 81 Newgate Street, London, EC1A 7AJ;

"**Business Day**" means any day other than a Saturday or Sunday, or a public holiday recognised by CEC;

"**Building Fixing Agreement**" means the agreement in the form set out in Schedule Part 33 (*Building Fixing Agreement*);

"**CAA**" means the Civil Aviation Authority;

"**Cable and Wireless**" means Cable and Wireless UK, a company incorporated under the Companies Act with registered number 01541957 and having its registered office at Lakeside House, Cain Road, Bracknell, Berkshire, RG12 1XL;

"**Case for Safety**" means all necessary documentation, information and other requirements for the issue of a safety certificate or a safety authorisation (as appropriate) by the Office of the Rail Regulation pursuant to the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

"**CDM Co-ordinator**" has the meaning given in Clause 50.1;

"**CDM Regulations**" means the Construction (Design and Management) Regulations 2007 (SI 2007/320);

"**CEC**" means the City of Edinburgh Council;

"**CEC Guarantee**" means the guarantee granted by CEC in favour of Infracore of even date as the date of this Agreement;

"**Certificate of Sectional Completion**" means any certificate issued by **tie** in accordance with Clause 44.3;

"**Certificate of Service Commencement**" means the certificate issued by **tie** in accordance with Clause 45.3;

"**Certificate of Tram Commissioning**" means the certificate to be issued by the Tram Inspector in accordance with Clause 2.4.8 of Schedule Part 34 (*Tram Inspector Agreement*);

"**Change in Control**" means any sale or disposal of any legal, beneficial or equitable interest in share capital comprising at least 30% of either Infracore Member, the sale of its business and assets or the transfer or acquisition of the ability to direct its management and control;

"**Change in Law**" means the coming into effect after the 7 August 2007 or, in relation to the Tram Supply Obligations and Tram Maintenance Obligations only, the 14 September 2007 of:

- (a) Legislation, other than any Legislation which on the 7 August 2007 or, in relation to Legislation which affects the Tram Supply Obligations and Tram Maintenance Obligations only, the 14 September 2007 has been published:
- (i) in a draft Bill as part of a Scottish Executive/Scottish Parliament or United Kingdom Government consultation paper;
 - (ii) in a Bill;
 - (iii) in draft subordinate Legislation within the meaning of section 21(1) of the Interpretation Act 1978; or
 - (iv) as a proposal in the Official Journal of the European Union.
- (b) any Guidance or any changes to Guidance; or
- (c) any applicable judgement of a relevant court of law which changes a binding precedent;
- (d) any new requirement for any statutory Consent other than statutory Consents the need for which had been published on 7 August 2007;

"Code of Construction Practice" or "CoCP" means the code of construction practice set out at part A of Schedule 3 (*Code of Maintenance Practice and Code of Construction Practice*);

"Code of Maintenance Practice" means the code of maintenance practice set out at part B of Schedule 3 (*Code of Maintenance Practice and Code of Construction Practice*);

"Code" means the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 as the same may be amended, varied or replaced from time to time;

"Commencement Date" means the date the CP Certificate has been issued or, if there are no Conditions Precedent, the Effective Date;

"Compensation Event" means:

- (a) any breach by **tie**, the **tie** Representative or any **tie** Party of any of **tie's** obligations under this Agreement which adversely affects the performance of the Infracore Works;
- (b) the failure of **tie** to give possession or access as referred to in Clause 18 (*Land Consents, Permanent Land and Temporary Sites*) or the refusal of any landowner or

occupier to allow the Infraco to exercise the rights of possession or access granted in accordance with this Agreement;

- (c) the exercise by CEC of its discretion to temporarily stop up streets where the exercise of such discretion adversely affects the Infraco's performance of its obligations under this Agreement;
- (d) execution of any Utilities Works or MUDFA Works;
- (e) instructions by **tie's** Representative to which Clause 34.3 applies;
- (f) failure by **tie** to obtain any Land Consent pursuant to Clause 18 (*Land Consents, Permanent Land and Temporary Sites*) (to the extent this is **tie's** responsibility) or any **tie** Consent;
- (g) the discovery by the Infraco of unexploded ordnance, unidentified utility apparatus, adverse physical conditions, ground conditions, artificial obstructions and/or land which is contaminated in the circumstances described in Clause 22.5;
- (h) protestor action directed against **tie** or a **tie** Party or the Edinburgh Tram Network which, save in respect of Tram Supply Protestor Action, lasts (or the impact of which lasts) for more than 14 days provided such protestor action has not arisen as a result of or been caused by an Infraco breach of its obligations under this Agreement or otherwise by any actions or omissions of the Infraco or Infraco Parties unrelated to the Edinburgh Tram Network provided that for the avoidance of doubt such protestor action shall be a Compensation Event as from the fifteenth day of its duration;
- (i) Tram Supply Protestor Action which exceeds one day in duration;
- (j) any breach by Network Rail of the Asset Protection Agreement or the Network Rail Agreement;
- (k) the occurrence of any Operator Event;
- (l) any damage to the Edinburgh Tram Network caused by vandalism;
- (m) the malfunction or non-interoperability of free issue material pursuant to Clause 9.10;
- (n) a breach by **tie** or any **tie** Party of any of its obligations under the Depot Licence which adversely affects the performance of the Infraco Works or any exercise of **tie's**

rights of access which disrupts or interferes with the Infraco Works in terms of Clause 24.6;

- (o) **tie's** Representative's failure to attend the tests or to carry out the inspections (or rearranged inspections or tests) and the carrying out of such tests or inspections on the new dates notified by **tie's** Representative pursuant to Clause 41.1;
- (p) compliance with **tie's** Representative's instructions under Clause 87 (*Suspension of Work*) which involves the Infraco in delay or extra cost (including costs incurred in properly protecting and securing the Infraco Works);
- (q) any breach by the Tram Inspector of the Tram Inspector Agreement;
- (r) any other event which is expressly stated as a Compensation Event in terms of this Agreement;
- (s) the occurrence of a Relief Event which is the direct cause of the Infraco suffering delay of more than 3 months in delivering the Depot where such delay leads to a Compensation Event under the Tram Supply Agreement;
- (t) save as excluded by Clause 19.19, failure of the SDS Provider to achieve the release of Issued for Construction Drawings by the date identified in the Programme for the release of such Issued for Construction Drawings;
- (u) any material breach (as distinct from (t) above) by the SDS Provider of its obligations under the SDS Agreement or in delict in relation to the quality of the Deliverables under the SDS Agreement;
- (v) Operator instructions or actions as stated in Clause 17.35 requiring the addition of works or services not included in the scope of the Tram Supply Agreement and where the Tram Supplier claims reasonable, substantiated economic compensation for such works or services from the Infraco in accordance with Clause 49 (*Compensation Event*) of the Tram Supply Agreement;
- (w) in relation to the granting of Consents for building fixings, where the granting of such Consents is either refused or is delayed in accordance with Clause 20.12;
- (x) delay arising between the date **tie** is notified of a Notified Departure and the actual date on which **tie** issue a **tie** Change Order in respect of such Notified Departure;

"Conditions Precedent" means the execution by the Infraco of the Tram Supply Novation Agreement, the Tram Maintenance Novation Agreement and the SDS Novation Agreement and the provision of those instruments required to be provided on the Effective Date by Clause 74 (*Bond, Parent Company Company Guarantees and Collateral Warranties*) and the agreed form of German legal opinions in respect of each Parent Company Guarantee;

"Confidential Information" means any information which has been designated as confidential by either Party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) including information which relates to the business, affairs, properties, assets, trading practices, goods, services, developments, trade secrets, Intellectual Property Rights, know-how, personnel of either Party, all personal data and sensitive personal data within the meaning of the Data Protection Act 1998;

"Consents" means, without limitation, all permissions, consents, approvals, non objections, certificates, permits, licences, agreements, statutory agreements and authorisations, Planning Permissions, temporary traffic regulation orders, building control approvals, building warrants, Access Permits, Permits to Work and all other necessary consents and agreements whether required by Law or the Tram Legislation or under contract provided that, subject to Clause 18.17, **"Consents"** shall not include any Land Consents or Building Fixing Agreements;

"Consents Programme" means the programme for submitting elements of the Design for approval by the relevant Approval Bodies set out in Schedule Part 15 (*Programme*), showing the time assumed for the issue of the relevant Consent by the Approval Body, period allowed in Schedule Part 14 (*Design Review and Design Management Plan*) for **tie** review and the date of issue of the Issued for Construction Drawings for each element of the Design as such programme may be amended from time to time in accordance with this Agreement;

"Construction and Maintenance Stage Consent" means the Consents listed in Table B below and any further Consents required to enable the construction of a design which has been fully consented, but excluding **tie** Consents.

Table B

Construction and Maintenance Stage Consents (indicative only)		
	Temporary Discharge Consents	
	Hoarding Licences	
	Obtaining and maintaining Building Warrants and subsequent certification	
	Testing, commissioning and service commencement permissions and certificates; Temporary Works Consents; Consents pursuant to Clause 21.4	

"**Construction Interim Certificate**" means any certificate to be issued by **tie** in accordance with Clause 67.5;

"**Construction Milestone**" means any milestone (other than any Critical Milestone) which has been identified and defined as a construction milestone in of Schedule Part 5 (*Milestone Payments*);

"**Construction Milestone Completion Certificate**" means any certificate in respect of achievement of a Construction Milestone issued by **tie's** Representative in accordance with Clause 41.3;

"**Construction Payment Due Date**" has the meaning given to it in Clause 67.6;

"**Construction Phase Health and Safety Plan**" means the plan proposed by the Infraco in accordance with the requirements of the CDM Regulations;

"**Construction Works Price**" means the construction works price included in Schedule Part 4 (*Pricing*) as may be varied from time to time in accordance with this Agreement;

"**Construction/Operational Panel**" has the meaning given to it in paragraph 19.1 of Schedule Part 9 (*Dispute Resolution Procedure*); "**Contract Price**" means the Contract Price made up of the elements shown in Schedule Part 4 (*Price*) as may be varied from time to time in accordance with this Agreement;

"**Contract Price Analysis**" means the analysis set out in section 2.5 of Schedule Part 4 (*Price*);

"**Control Centre**" means the control centre for the Edinburgh Tram Network to be provided by the Infraco pursuant to this Agreement and operated by the Operator pursuant to the DPOFA;

"**CP Certificate**" means the certificate to be issued by **tie** in accordance with Clause 3.3, confirming that each of the Conditions Precedent, if any, have been waived or satisfied;

"**Critical Milestone**" means any milestone which has been identified and defined as "critical" in respect of an Application for Milestone Payment in Schedule Part 5 (*Milestone Payments*);

"**Critical Milestone Completion Certificate**" means any certificate in respect of achievement of a Critical Milestone issued by **tie's** Representative in accordance with Clause 41.3;

"**Critical Milestone Payment**" means the payment to be made against the achievement of a Critical Milestone for an amount set out in Schedule Part 5 (*Milestone Payments*);

"**CSCS**" means Construction Skills Certification Scheme;

"**Deliverables**" all documents, information, reports, diagrams, pricing schedules, records, method statements, risk assessments, manuals, schedules, databases, reinforcement details, photographs, formulae, plans, designs, specifications, drawings (including as-built drawings), details, calculations, analysis, operation and maintenance manuals, software, data, data configuration designs, tools and details, software protocols, source and object codes, transport and other models and simulations, the outputs and reports based on any models, programmes and all other material created and/or provided by Infraco (and/or any Infraco Party or any other third party) in relation to the Infraco Works required to deliver the Infraco Works;

"**Depot**" means the depot at Gogar comprising maintenance facilities, stabling facilities, sidings, operations, cleaning, the Control Centre, storage facilities and accommodation for operational and maintenance staff;

"**Depot Licence**" means the licence in the form set out in Schedule Part 32 (*Depot Licence*) as executed by the Infraco, the Operator and Tram Maintainer;

"**Design**" means the design of the Edinburgh Tram Network;

"**Design Manual**" means the design manual issued by CEC from time to time;

"**Design Stage Consents**" means the Consents (in respect of Design produced by SDS Provider or Infraco Design) listed in Table A below and any further consents that the SDS

Provider is responsible for obtaining under the SDS Agreement, save for Construction and Maintenance Stage Consents.

Table A

Category	Type	Approval Body
Railways and Aviation	HMRI	HMRI
	Network Rail	Network Rail
	EAL/BAA/Aviation Consents (including EAL Permissions) and EAL Works Data to the extent that the same are deliverables under the SDS Agreement	EAL/BAA/CAA/NATS
Planning	Listed Building Consent	CEC Planning Authority
	Prior Approval	CEC Planning Authority
	Planning Permission	CEC Planning Authority
	Conservation Area Consent	CEC Planning Authority
	Scheduled Monument Consent	Scottish Executive & Historic Scotland
	Advertisement Consent	CEC Planning Authority
Traffic Management	Road Technical Approvals relating to structures, lighting, traffic signals, road markings, safety and geometry and drainage	CEC Roads Authority
Environment Ecological	Badger Licence	Scottish Natural Heritage
	Otter holt/disturbance licence	Scottish Natural Heritage
	Bat Licence	Scottish Natural Heritage
	Appropriate Assessment	Competent Authority
Drainage CAR	CAR General Binding Rules	SEPA
	CAR Registration	SEPA
	CAR Licence	SEPA
	Water/Wastewater Connection	Scottish Water
Construction	Discharge Consents to the extent related to design of the permanent works	SEPA
	Technical Approval	CEC Bridges/CEC Roads
	Building Warrant	CEC Building Standards
Radio	OFCOM licence	OFCOM
Design Consultation	Third party Design Consultation	Third parties
Undertakings	Undertakings to Parliament	Parliament and third parties
Agreements	Third parties approvals/consents	Third parties

"Designated Working Area" means any land, worksite or area of the public road which the Infraco occupies for the purposes of executing the Infraco Works;

"Discriminatory Change in Law" means a Change in Law, the terms of which apply expressly to:

- (a) the Edinburgh Tram Network; and/or
- (b) the Infraco, the Tram Supplier and/or the Tram Maintainer and not to other persons;

"Dispute" means any dispute, difference or unresolved claim between the Parties in connection with or arising from this Agreement;

"Dispute Resolution Procedure" means the procedure set out in Schedule Part 9 (*Dispute Resolution Procedure*);

"DPOFA" means the development, partnering and operating franchise agreement between **tie** and the Operator dated 14 May 2004 as amended by Minute of Variation dated 19 and 20 December 2007;

"DPOFA Change" has the meaning given in Clause 17 (*Interface with the Operator*);

"DPOFA Change Response" has the meaning given in Clause 17 (*Interface with the Operator*);

"DPOFA Infraco Event" means any breach (including any breach which results in an alteration to the Programme) by the Infraco of its obligations set out in this Agreement which (i) results in the Operator asserting any claim against **tie** for relief from the performance of its obligations, compensation or indemnification pursuant to the DPOFA; or (ii) results directly in a **tie** DPOFA Change;

"Drawdown Notice" has the meaning given in Schedule Part 44 (*EAL Works*);

"Drawings" means those plans and drawings contained in Schedule Part 31 (*Drawings*);

"EAL" means Edinburgh Airport Limited, a company incorporated under the Companies Acts with registered number SCO96623 and having its registered office at St Andrew's Drive, Glasgow Airport, Paisley, PA3 2SW;

"EAL Artefacts" has the meaning given to it in paragraph 21 of Appendix 5 Schedule Part 44 (*EAL Works*);

"EAL Lease" means the lease from EAL (as landlord) to CEC (as tenant) dated 20 and 25 February 2008 (as may be amended from time to time);

"**EAL Licence**" means the licence agreement between EAL and CEC dated 28 January 2008 and 25 February 2008, together with its schedule (as may be amended from time to time);

"**EAL Permissions**" means all:

- (a) permits, licences, consents, approvals, permissions, warrants, relaxations which are required by any applicable Law; and
- (b) any third party consents which require to be obtained,

for the carrying out of the EAL Works;

"**EAL Works**" has the meaning given in Schedule Part 44 (*EAL Works*);

"**EAL Works Data**" has the meaning given in Schedule Part 44 (*EAL Works*);

"**Earthworks Outline**" has the meaning ascribed to it in Schedule Part 4 (*Pricing*);

"**Easynet**" means Easynet Telecommunications Limited, a company incorporated under the Companies Act with registered number 02883980 and having its registered office at 44-46 Whitfield Street, London, W1T 2RJ;

"**Edinburgh Tram Network**" means the tramway which is to be designed, constructed and maintained in Edinburgh pursuant to this Agreement in Phase 1a (forming part of Line One and Line Two as described in the Tram Legislation) and, if the Phase 1b option set out in Clause 85 is exercised, Phase 1b, together with all associated works and facilities required pursuant to this Agreement including all civil engineering and track works, Trams, infrastructure, plant, machinery and equipment installed or used for the operation of such tramway;

"**Effective Date**" means the last date of execution of this Agreement;

"**EHS KPI Deduction**" has the meaning given in Clause 67.5;

"**EIA**" means environmental impact assessment;

"**EMC**" means electro magnetic current;

"**Emergency Services**" means Lothian and Borders Police, Lothian and Borders Fire Brigade, British Transport Police, Scottish Ambulance Services and HM Coastguard;

"**Employer's Requirements**" means the specification or specifications set out in Schedule Part 2 (*Employer's Requirements*) and any modification thereof or addition thereto as may be made from time to time in writing by **tie** or **tie's** Representative in accordance with this Agreement;

"**Environmental Information Regulations**" means the Environmental Information (Scotland) Regulations 2004, Scottish SI 2004/520;

"**Environmental Statements**" means the environmental statements supporting the Tram Legislation;

"**Estimate**" means the estimate to be provided by the Infraco pursuant to Clause 80 (*tie Change*);

"**Euro Compliant**" has the meaning given in Clause 9.10;

"**Expiry Date**" means (subject to **tie's** right to extend in accordance with Clause 2) the date falling 10 years from the issue of the Certificate of Service Commencement;

"**Expiry Survey**" has the meaning given in Clause 96.1;

"**Extended Expiry Date**" means the date falling 15 years from the issue of the Certificate of Service Commencement or such later date as may be agreed between the Parties in accordance with Clause 2.4;

"**Final Persistent Breach Notice**" means a notice served by **tie** pursuant to Clause 93.2;

"**Financial Panel**" has the meaning given to it in paragraph 19.1 of Schedule Part 9 (*Dispute Resolution Procedure*);

"**First Party**" has the meaning given in Clause 6.3;

"**FOISA**" means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation made under that Act from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner in relation to such legislation;

"**Force Majeure Event**" means the occurrence after the Effective Date of:

- (a) war, civil war or armed conflict in the United Kingdom or the United Kingdom and Spain;

- (b) nuclear, chemical or biological contamination unless the source or cause of the contamination is the result of actions by the Infraco or any Infraco Party; or
- (c) pressure waves caused by devices travelling at supersonic speeds;
- (d) exceptionally adverse weather conditions affecting shipment or transportation of Trams.

"Forth Ports" means Forth Ports PLC a company incorporated under the Companies Acts with registered number SC134741 and having its registered office at 1 Prince of Wales Dock, Leith, Edinburgh, EH6 7DX;

"Free Issue Fare Collection Equipment" means all fare collection equipment issued to Infraco or an Infraco Party by **tie** or a **tie** Party;

"General Change in Law" means a Change in Law which is not a Qualifying Change in Law;

"Good Industry Practice" means using standards, practices, methods and procedures conforming to Law and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably be expected from a large, reputable, professionally qualified, competent and skilled organisation experienced in carrying out activities of a similar nature, scope and complexity to those comprised in the Infraco Works and seeking in good faith to comply with its contractual duties and all duties owed by it;

"Green Zone Working" means the term applied to those works carried out on Network Rail infrastructure while traffic is still operating and staff are protected by means other than look-out;

"Ground Condition Information" means the materials, documents, surveys, analysis, drawings, plans or other information in paper or electronic, relating in any way to the ground and physical conditions at the Site as set out in Part A Schedule Part 41 (*Ground Conditions and Utilities Information*);

"Guidance" means any applicable guidance, policy, direction or determination issued by any Approval Body with which **tie**, CEC, the Infraco and/or the Infraco Parties are bound to comply, and shall include the **tie** and CEC Policies (set out in Schedule Part 32 (*tie and CEC Policies*));

"**Handback Package**" means the information referred to in Clause 95 (*Transition on Termination or Expiry*), as updated by the Infraco from time to time in accordance with the provisions of Clause 95 (*Transition on Termination or Expiry*);

"**Hazardous Materials**" means any materials, Parts or systems generally known and accepted at the time of their use by the Infraco or any Infraco Party in performing the Maintenance Services to comprise or contain a toxic substance or other hazard to the safety or health of persons or safety of property;

"**Health and Safety File**" has the meaning given in Clause 50.1;

"**Heritable Proprietor**" means the heritable proprietor of a building, or where such building consists of a tenement or other flatted dwelling houses, the heritable proprietor of each flat or sub-unit;

"**Historic Scotland**" means an agency within the Scottish Executive Education Department which was established in April 1991 and having its principal office at Longmere House, Salisbury Place, Edinburgh, EH9 1SH;

"**HMRI**" means Her Majesty's Railway Inspectorate or its successor or equivalent regulatory body or person;

"**HSE**" means Health and Safety Executive;

"**HSQE Manager**" means the manager appointed in accordance with Clause 105.5;

"**HSQE**" has the meaning given in Clause 105.1;

"**Indemnified Parties**" has the meaning given to it in Clause 77.1;

"**Independent Competent Person**" means Mr. John Dolan or such other person appointed by **tie** to agree and oversee the implementation of all procedures and processes to comply with the provisions of the Railway and Other Guided Transport Systems (Safety) Regulations 2006 and to enable the testing, commissioning and operation of the ETN;

"**Indexed**" means in relation to an amount, the amount to be indexed multiplied by the value of RPIX at the Point of Indexation, divided by the Base Case RPIX;

"**Indirect Losses**" means any damage, cost, third party claim, expense or loss incurred by a Party to this Agreement or by any Infraco Parties or any of the Indemnified Parties as a consequence of a breach of this Agreement or a negligent act or omission which relates to

consequential or indirect loss or loss of profits or revenue, loss of use, loss of production or output, interruption or loss of business or business opportunity, loss of contract, loss of goodwill and whether or not the Party committing the breach knew, or ought to have known, that such indirect or consequential loss would be likely to be suffered as a consequence of such breach.

"Information" shall have the meaning given to it in Section 73 of FOISA;

"Infraco Change" means a change proposed by the Infraco in accordance with Clause 81.1 and approved by **tie** in accordance with Clause 80 (**tie Changes**) or Clause 81 (*Infraco Changes*);

"Infraco Default" means one of the following events:

- (a) a breach by the Infraco of any of its obligations under this Agreement which materially and adversely affects the carrying out and/or completion of the Infraco Works;
- (b) the occurrence of an Insolvency Event in relation to the Infraco or either of the Infraco Members;
- (c) the Infraco fails to commence the Infraco Works within 90 days of the Commencement Date or permanently abandons the Infraco Works (or a material part of them) at any time;
- (d) the Service Commencement Date or Sectional Completion Date (as appropriate) in respect of a Section is not achieved or is programmed to not be achieved (as set out in the Programme) on or before the date falling 12 months after the Planned Service Commencement Date or Planned Sectional Completion Date (as appropriate) except as a result of a Compensation Event, Relief Event, Force Majeure Event, **tie** Change, Accommodation Works Change, a Change in Law (where compliance with such Change in Law is the sole reason for the Infraco failure to achieve the relevant date) and any legitimate suspension of the Infraco Works by the Infraco pursuant to Clause 87 (*Suspension of Work*);
- (e) the Infraco does not confirm its agreement in writing to a Liquidated Damages Cap Increment in accordance with Clause 62.10;

- (f) a breach by the Infraco of its obligations to take out and maintain the Required Insurances which is not remedied by the Infraco within 10 days of written notice from **tie** to the Infraco specifying the relevant breach and requiring it to be remedied;
- (g) the issue of four or more Underperformance Warning Notices in any 12 month period;
- (h) NOT USED
- (i) the Infraco has reported a change in the legal status of the Infraco or a Change in Control of the Infraco which is materially prejudicial to carrying out and completing the Infraco Works; or
- (j) the Infraco has suspended the progress of the Infraco Works without due cause for 15 Business Days after receiving from **tie's** Representative a written notice to proceed.

"Infraco's Design" means any Design used by Infraco which SDS Provider is not responsible for producing pursuant to the SDS Agreement;

"Infraco's Equipment" means all plant, appliances or things of whatsoever nature required in or about the construction and completion of the Infraco Works but does not include materials or other things intended to form or forming part of the Infraco Works and does not include Assets;

"Infraco IPR" means:

- (a) all Intellectual Property Rights in the Deliverables (including Intellectual Property Rights in relation to the Infraco Software) which were already existing and owned by, or licensed to, the Infraco and/or the Infraco Parties prior to the Effective Date;
- (b) any modifications or developments of any of the Intellectual Property Rights referred to in paragraph (a) above which are generic in nature and not specific to the carrying out of the Infraco Works; and
- (c) all Intellectual Property Rights in tram signalling systems, communication systems, SCADA systems and system integration programmes, methodologies or software

in all cases excluding Tramco IPR.

"Infraco Party" means each and any of the Infraco Member's employees, directors, officers, agents, professional advisors, consultants and contractors and its or their sub-contractors (of any tier) including the Sub-Contractors and shall include its or their directors, officers and

employees as they are involved in relation to the Infraco Works and "**Infraco Parties**" shall be construed accordingly;

"**Infraco's Proposals**" means the Infraco's proposals for implementation of the Infraco Works included in Schedule Part 30 (*Infraco Proposals*) as amended from time to time in accordance with this Agreement;

"**Infraco's Representative**" shall have the meaning given to it in Clause 26.2;

"**Infraco Safety Management System**" has the meaning given in Clause 17.18.2.2;

"**Infraco's Site Rules**" means the site rules prepared by the Infraco which are relevant to the Infraco Works;

"**Infraco Software**" means programs, the Intellectual Property Rights in which are:

- (a) owned by the Infraco; and
- (b) used by the Infraco to carry out its obligations under this Agreement.

"**Infraco Works**" means, as the context requires, the EAL Works and all or any of the works to be constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco and which are necessary to deliver the Edinburgh Tram Network and to subsequently maintain it, all in accordance with this Agreement and the Employer's Requirements.

"**Infrastructure Maintenance Services**" means the ongoing maintenance of the Edinburgh Tram Network (excluding the Trams), supply of spares, Special Tools and the provision of any associated services and other obligations incumbent on the Infraco as described in this Agreement;

"**Infrastructure Maintenance Services Payment**" means the payment to be made to the Infraco in respect of the performance of the Infrastructure Maintenance Services in accordance with this Agreement. This payment shall be based on the sums set out in Schedule Part 4 (*Pricing*) and the final amount to be paid in each Reporting Period to the Infraco shall be calculated in accordance with Clause 68 (*Payment in Respect of Maintenance Services*) and part A of Schedule Part 6 (*Maintenance Payment Regime*).

"**Infrastructure Maintenance Plan**" means the maintenance plan to be prepared by the Infraco in relation to the Infrastructure Maintenance Services;

"Initial Buildability Report" means the report to be prepared by the Infraco in accordance with Schedule Part 2 (*Employer's Requirements*);

"Insolvency Event" means any of the following events in relation to a Party:

- (a) the Party is unable to pay its debts as they fall due or is insolvent or admits (in writing) its inability to pay its debts as they fall due;
- (b) the Party suspends for a period of two months making payments on all or any class of its debts or a moratorium is declared by the Party in respect of its indebtedness;
- (c) the Party ceases business or announces an intention to do so;
- (d) the following are entered into:
 - (i) a voluntary arrangement (other than a solvent one) for a composition of debts of the Party;
 - (ii) a scheme of arrangement in respect of the Party pursuant to the Insolvency Act 1986 or the Companies Act 1985; or
 - (iii) a material composition or arrangement (other than a solvent one) with the Party's creditors;
- (e) either of the following:
 - (i) the winding-up of the Party (including passing a shareholders' resolution or the presentation of a petition by the Party for the purpose of winding up the Party); or
 - (ii) its administration (including where an application is made by the Party or petition is presented by the Infraco for, or any meeting of its directors or members resolves to make an application for, an administration order);
- (f) an order for the winding-up or administration of the Party is made;
- (g) any liquidator, judicial custodian, receiver, administrative receiver, administrator or the like is appointed in respect of any Party or any material part of the Party's assets;
- (h) possession is taken of, or any distress, execution or other process (other than on the dependence of inhibition) is levied or enforced upon, any material part of the property

(whether real or personal) of the Party by or on behalf of any creditor or encumbrancer of the Party; or

- (i) anything analogous to any of the events mentioned in paragraphs (a) to (h) above occurs in relation to the Party under the law of any relevant jurisdiction specifically the opening of insolvency proceedings pursuant to the EC Insolvency Regulation 1346/2000, the Insolvency Act 1986 or the Bundesinsolvenzgesetz of 5 October 1994 (as amended) or the equivalent under the laws of Spain;

"Insolvency Termination Notice" has the meaning given to it in Clause 90.1.3;

"Intellectual Property Rights" means any rights in or to any patent, design right, utility model, trade mark, brand name, service mark, trade name, business name, logo, invention (whether registered or unregistered), domain name, semi-conductor right, topography right, software designs and/or other materials, source code, copyright, moral right, know-how or rights in databases and any other rights in respect of any industrial or intellectual property, whether capable of being registered or not, including all rights to apply for any of the foregoing rights or for an extension, revival or renewal of any of the foregoing rights and any similar or analogous rights to any of the above, whether arising or granted under the law of Scotland or of any other jurisdictions;

"Internal Resolution Procedure" means the procedure described in paragraphs 9 and 10 of Schedule Part 9 (*Dispute Resolution Procedure*);

"IPR" means intellectual property rights;

"Issued for Construction Drawings" means those Deliverables necessary for the Infraco to commence construction of the relevant part of the Infraco Works and as shown on the Design Delivery Programme which have been fully approved by all Approval Bodies and in accordance with the Review Procedure;

"Key Personnel" means those staff identified as key personnel of the Infraco and/or any Infraco Parties in Schedule Part 12 (*Key Personnel*);

"Key Sub-Contractor" means any supplier or sub-contractor carrying out works falling within the categories set out in Schedule Part 38 (*Approved Suppliers and Sub-contractors (and Trades)*) as may be amended from time to time;

"Land Consents" means all licences to occupy land, wayleaves and any other licences, permissions, rights of access and related consents in respect of land required for the Infraco

Works including rights of access and related consents in respect of land to which the EAL Lease and EAL Licence apply and all related Drawdown Notices;

"Last Tram" means each of the timetabled Trams which are the last to operate in passenger service on each route in each direction prior to the Edinburgh Tram Network shutting down for the night;

"Late Tram" means either:

- (a) a Tram:
 - (i) that is in passenger carrying service; and
 - (ii) is arriving at Edinburgh Airport or departing from any other Monitoring Point; and
 - (iii) in the case of Edinburgh Airport its arrival, when compared to the Timetable, is more than 2 minutes (i.e. 120 seconds) late; or
 - (iv) its departure from any other Monitoring Point when compared to the Timetable is timed either more than 2 minutes (i.e. 120 seconds) late or more than 1 minute (i.e. 60 seconds) early; or
- (b) where there is no Tram running in service at a Monitoring Point, contrary to the Timetable;

"Law" means:

- (a) any applicable Legislation;
- (b) any applicable Guidance; and
- (c) any applicable judgment of a relevant court of law which is a binding precedent;

in each case in force in Scotland;

"Legal Panel" has the meaning given to it in paragraph 19.1 of Schedule Part 9 (*Dispute Resolution Procedure*);

"Legislation" means any Act or instruments of the Scottish Parliament or the United Kingdom Parliament or subordinate legislation within the meaning of section 21(1) of the Interpretation

Act 1978, any exercise of the Royal Prerogative, and any enforceable community right within the meaning of section 2 of the European Communities Act 1972, and any bye-laws of any local or other statutory authority;

"**Liability Cap**" means:

- (i) Subject always to subparagraphs (ii) to (iv) below, in relation to:
 - (a) any claim brought or liability incurred by **tie** or the Indemnified Parties prior to the issue of the Reliability Certificate or within 6 months of the issue of the Reliability Certificate arising from or in connection with Infraco Works (other than Infrastructure Maintenance Services after the Service Commencement Date) carried out prior to the issue of the Reliability Certificate;
 - (b) latent defects and uncorrected Patent Defects;
 - (c) any third party claim made against **tie** or the Indemnified Parties for direct loss or damage made after the issue of the Reliability Certificate and arising from or in connection with latent defects;
 - (d) liabilities owed by the Infraco connected with liquidated damages outstanding from settlement of final account after Service Commencement;

twenty percent (20%) of the Construction Works Price (including, the value of any **tie** Changes arising from Clause 80 (*tie Changes*), Notified Departures, extensions to the Edinburgh Tram Network instructed through Clause 81 (*Infraco Changes*), Clause 85 (*Phase 1b*) or Clause 86 (*Network Expansions*) (the "**Construction Cap**"), subject to (A) in the case of any liability arising solely from the breach of contract or negligent acts or omissions of the SDS Provider, the SDS Liability Cap; and (B) in the case of any liability arising under (c) above, nine million pounds (£9,000,000);

- (ii) subject to sub-paragraphs (iii) and (iv), in respect of claims brought against or liabilities incurred by **tie** or the Indemnified Parties to which paragraph (i) above does not apply, an amount of three million, five hundred thousand pounds (£3,500,000) (in relation to Phase 1a), or the Maintenance Cap, whichever is lower;
- (iii) In relation to liability arising solely from any act or omission of the Tram Supplier, an amount when aggregated with all previous claims equal to twenty percent (20%) of the Aggregate Tram Price and (excluding the proceeds of all insurance, bonds and cash

securities) as defined in the Tram Supply Agreement, such liability to be treated as outside the Construction Cap;

- (iv) In relation to liability arising from any act or omission of the Tram Maintainer, an aggregate amount of eighteen and one half percent (18.5%) of the aggregate Maximum Performance Payment over the Term of and as defined in the Tram Maintenance Agreement and annually twenty two and one half percent (22.5%) of the aggregate Maximum Performance Payment as defined in the Tram Maintenance Agreement of the Tram Maintenance Services, (in the case of the aggregate cap only, excluding the proceeds of any insurance, bonds and cash securities) such liability to be treated as outside the Maintenance Cap;

"Maintenance Cap": means in relation to each year, the amount attributable to that year as calculated below:

- (a) the cap for the mobilisation period and the first three years following the Service Commencement Date shall be calculated as follows:

$$MC = \left(27 \left(\frac{MP + IMSP}{100} \right) \right)$$

where:

MP = the aggregate of payments made in respect of Mobilisation Milestones; and

IMSP = the Infrastructure Maintenance Service Payment to be made in respect of the first three full years following the final Service Commencement Date.

- (b) for the fourth year the cap shall be calculated as follows:

$$AMC_4 = MC + \left(27 \left(\frac{IMSP}{100} \right) \right)$$

where:

MC = the maintenance cap calculated pursuant to sub-paragraph (a) above; and

IMSP = the Infrastructure Maintenance Service Payment to be made in respect of the fourth year.

provided that AMC_4 shall not exceed THREE MILLION FIVE HUNDRED THOUSAND POUNDS (£3,500,000).

(c) the cap for each subsequent year shall be calculated as follows:

$$AMC_n = AMC_{(n-1)} + \left(27 \left(\frac{IMSP}{100} \right) \right)$$

where:

n is the number of years following the Service Commencement Date

$AMC_{(n-1)}$ = the annual maintenance cap calculated for the immediately preceding year;
and

$IMSP$ = the Infrastructure Maintenance Service Payment to be made in respect of the year n .

provided that AMC_n shall not exceed THREE MILLION FIVE HUNDRED THOUSAND POUNDS (£3,500,000).

"Line One" means the tramway works as authorised by the Edinburgh Tram (Line One) Act 2006;

"Line Two" means the tramway works as authorised by the Edinburgh Train (Line Two) Act 2006;

"LLAU" means the limits of land to be temporarily acquired and used for the Edinburgh Tram Network;

"Local Code of Construction Practice" means a code of construction practice that is to be established by **tie** in respect of a party whose private or commercial interests are affected by the execution of the construction, installation, re-installation or renewal of the Edinburgh Tram Network;

"LOD" means the limits of deviation for the Edinburgh Tram Network;

"Maintenance Contract Price" means the maintenance contract price in respect of the Infrastructure Maintenance Services and the Tram Maintenance Services included in Schedule Part 4 (*Price*) as may be varied from time to time in accordance with this Agreement;

"**Maintenance Mobilisation Period**" means the period ending on the Service Commencement Date;

"**Maintenance Payment Due Date**" has the meaning given to it in Clause 68.5;

"**Maintenance Plan**" means the Infrastructure Maintenance Plan and the Tram Maintenance Plan and/or the Tram Maintainer's proposals for implementation of the Infrastructure Maintenance Services or Tram Maintenance Services respectively;

"**Maintenance Programme**" means the programme for carrying out the Maintenance Services as developed by the Infraco and amended from time to time in accordance with this Agreement;

"**Maintenance Services**" means the Infrastructure Maintenance Services and the Tram Maintenance Services;

"**Maintenance Services Interim Certificate**" means any certificate to be issued by **tie** in accordance with Clause 68.4;

"**Maintenance Services Payment**" means the Infrastructure Maintenance Services Payment and/or the Tram Maintenance Services Payment;

"**Maintenance Specification**" means the specification or specifications in respect of Trams, infrastructure and equipment set out in Section 40 of Schedule Part 2 (*Employer's Requirements*) and any modification thereof or addition thereto as may from time to time be approved in writing in accordance with this Agreement;

"**Mandatory tie Change**" means any addition, modification, reduction or omission in respect of the Infraco Works instructed in accordance with Clause 80 (*tie Changes*) which this Agreement specifically states will be a Mandatory **tie** Change;

"**Maximum Tram Weight**" means the maximum weight of a tare Tram of 55.85 tonnes;

"**Milestone**" means a Construction Milestone, a Critical Milestone, a Mobilisation Milestone, a Tram Milestone and/or a Tram Maintenance Mobilisation Milestone;

"**Milestone Completion Certificate**" means a Construction Milestone Completion Certificate, a Critical Milestone Completion Certificate, Mobilisation Milestone Completion Certificate and/or Tram Milestone Completion Certificate;

"**Milestone Payment**" means the payment to be made against the achievement of a Milestone for an amount set out in Schedule Part 5 (*Milestone Payments*);

"**Minimum Spare Parts Pool**" means the minimum level of each Spare Part or Special Tool to be held in the Spare Parts Pool as specified in the Infraco's Proposals;

"**Mobilisation and Advanced Works Agreement**" means the agreement entered into between **tie** and Infraco on 21 December 2007;

"**Mobilisation Milestone**" means any milestone relative to the Infrastructure Maintenance Services which has been identified and defined as a mobilisation milestone in Schedule Part 5 (*Milestone Payments*);

"**Mobilisation Milestone Completion Certificate**" means any certificate in respect of achievement of a Mobilisation Milestone issued by **tie's** Representative in accordance with Clause 41.3;

"**Mobilisation Period**" means the period commencing on the Effective Date and ending on the Service Commencement Date;

"**Monitoring Point**" means the locations where the arrival or departure of Trams is recorded for the purpose of calculating Tram punctuality for the purpose of part A of Schedule Part 6 (*Maintenance Payment Regime*), being:

(a) **Phase 1a:** for the purposes of monitoring arrival and departure: Edinburgh Airport;

(b) **Phase 1a:** for the purposes of measuring departure only:

(i) Edinburgh Park Station;

(ii) Haymarket;

(iii) Foot of the Walk;

(iv) Leith (Newhaven or Ocean Terminal according to service); and

(v) Picardy Place;

(c) **Phase 1b:** for the purposes of measuring departure only:

(a) Crewe Toll (northbound only); and

(b) Granton Square;

"**Mobilisation Services**" means the mobilisation services to be provided by the Infraco during the Mobilisation Period in accordance with this Agreement;

"**MUDFA Contract**" means the agreement dated 4 October 2006 and entered into between **tie** Limited and the MUDFA Contractor;

"**MUDFA Contractor**" means Alfred McAlpine Infrastructure Services Limited, a company incorporated under the Companies Act with registration number 00728599 and having its registered office at Kinnaird House, 1 Pall Mall East, London, SW1Y 5AZ, which expression shall include its permitted assignees or such other multi-utilities diversion framework agreement sub-contractor appointed by **tie** from time to time in relation to the Edinburgh Tram Network;

"**MUDFA Works**" means the works carried out by the MUDFA Contractor under its contract with **tie**;

"**Network Certificate**" means a certified issued in accordance with Clause 47.3;

"**Network Expansion**" means any expansion of the Edinburgh tram Network beyond Phase 1a and Phase 1b;

"**Network Rail**" means Network Rail Infrastructure Limited, a Company incorporated under the Companies Act with registered number 2904587 and having its registered office at 40 Melton Street, London, NW1 2EE;

"**Network Rail Agreement**" means the protective provisions agreement entered into among **tie**, CEC and Network Rail and dated 17 and 21 June 2005;

"**Notice of Adjudication**" has the meaning given in paragraph 16 of Schedule Part 9 (*Dispute Resolution Procedure*);

"**Notification**" has the meaning given in paragraph 10.1 of Schedule Part 9 (*Dispute Resolution Procedure*);

"**Notified Departure**" has the meaning given in Schedule Part 4 (*Pricing*);

"**NOx**" means nitrogen oxides;

"**NPV**" means net present value;

"**NR**" means Network Rail;

"**NRSWA**" shall have the meaning given in Clause 21 (*New Roads and Street Works Act 1991 and Utilities Division*);

"**NTL**" means NTL Limited, a company incorporated under the Companies Act with registered number 02586701 and having its registered office at 160 Grant Portland Street, London, W1W 5QA;

"**Ocean Terminal**" means Ocean Terminal Limited, a company incorporated under the Companies Act with registered number SC178696 and having its registered office at 1 Prince of Wales Dock, Leith, Edinburgh, EH6 7DX;

"**OCIP Insurances**" means the insurances taken out and maintained by **tie** referred to in Clause 76 (*Required Insurances*) and set out in Schedule Part 11 (*Required Insurances*) which may be amended and notified (as required) to the Infraco from time to time;

"**OGC**" means the Office of Government Commerce, an independent office of the Treasury which was established in April 2001 and having its principal office at Rosebury Court, St. Andrew's Business Park, Norwich, Norfolk, NR7 0HS;

"**OLE**" means overhead line equipment;

"**On Street Construction Works Methodology**" means the document of that name contained in Schedule Part 15 (*Programme*);

"**Open Book Basis**" means the availability and disclosure (consistent with operation of Clause 104 (*Information and Audit Access*)) of a reasonable level of data and calculations used by the Infraco to create and justify costings and financial analysis presented to **tie** which shall include any management costs and overheads of Infraco to the extent relevant, and capable of being identified as being attributable to such costings or financial analysis;

"**Operating Day**" means a 24 hour period starting from 3a.m. on each day when the Trams are timetabled to run;

"**Operations and Maintenance Manual**" means the manual to be prepared by the Infraco in accordance with Clause 52.25;

"**Operations Performance Specification**" means the specification included within Schedule Part 2 (*Employer's Requirements*);

"**Operator**" means Transdev Edinburgh Tram Limited, a company incorporated in Scotland under registered number SC267598 and having its registered office at Level 2, Saltire Court,

20 Castle Terrace, Edinburgh EH1 2ET, appointed by **tie** as operator under the DPOFA or its successor;

"Operator Event" means:

- (a) any delay by the Operator in the performance of its obligations or exercise of its rights pursuant to DPOFA or in responding to any request from the Infraco to assist in relation to unforeseen damage to or interference with the Transport Services or minor obstruction on the Edinburgh Tram Network caused by any third party in so far as forming part of the Operator's responsibilities under DPOFA;
- (b) any material failure or omission in the provision of the Project Development Services or the performance of the Project Operations by the Operator;
- (c) any damage to or deficiencies in the Infraco Works caused directly and predominantly by the Operator; or
- (d) any act or omission by the Operator which:
 - (i) prevents or interfere with the design, installation, integration, system acceptance, testing, commissioning, operation or maintenance of the Edinburgh Tram Network;
 - (ii) increases the Contract Price;
 - (iii) requires the Infraco to apply for a variation to the Infraco Works in accordance with Clause 81 (*Infraco Changes*); or
 - (iv) adversely impacts on the Infraco Works, the Maintenance Services, the Edinburgh Tram Network and/or whole life costs or handback obligations in terms of Clause 95 (*Transition on Termination or Expiry*).

"Operator Maintenance" means the maintenance of the Edinburgh Tram Network to be carried out by the Operator in accordance with the DPOFA;

"Operator Maintenance Plan" means the plan to be prepared by the Operator in relation to the performance of the Operator Maintenance and notified to the Parties from time to time;

"Operator Procedures" means those procedures in place to ensure the safe and efficient maintenance operation of the Edinburgh Tram Network, as agreed between the Parties from time to time and as contained in the Review Procedure;

"**Operator's Case for Safety**" means the case for safety that the Operator is required to maintain in respect of the operation of the Edinburgh Tram Network;

"**ORR**" means the Office of Rail Regulation, an independent statutory body established on 5 July 2004 under the Railways and Transport Safety Act 2003;

"**Panels**" has the meaning given to it in paragraph 19 of Schedule Part 9 (*Dispute Resolution Procedure*);

"**Part**" means any component or furnishing or equipment intended to form part of the completed Edinburgh Tram Network furnished within or relating to the Edinburgh Tram Network whether or not the same is installed on the Edinburgh Tram Network (including any Tram);

"**Party**" means each and any of the parties to this Agreement and "**Parties**" shall be construed accordingly;

"**Patent Defect**" means any defect, deficiency, shrinkage or other fault due to design, goods, materials, workmanship or services not being in accordance with this Agreement and which are (i) apparent from or would be revealed by a non-intrusive inspection of the Infraco Works or (ii) obvious during their ordinary intended use as stipulated in the Employer's Requirements or Infraco Proposals;

"**Patent Defect Notification Period**" means 24 months from the Service Commencement Date;

"**Patent Defects Rectification Certificate**" means the certificate issued by **tie** upon the Infraco completing its obligations to rectify Patent Defects in accordance with the terms of the Agreement;

"**Performance Bond**" means the performance bond to be provided by the Infraco pursuant to Clause 74.1 which shall be substantially in the form set out in Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) issued by a surety approved by **tie** in advance in writing, such approval not to be unreasonably withheld or delayed;

"**Performance Review Date**" means the date 3, 8, and (if applicable) 13 years after the Service Commencement Date;

"Performance Review Period" means the period between each Performance Review Date (and the period between the Service Commencement Date and the first Performance Review Date);

"Permanent Land" means the land shown highlighted in blue on the plans and drawings set out in Schedule Part 31 (*Drawings*);

"Permits to Work" means the permits to work issued by **tie** in accordance with paragraph 3.5 of part A, and paragraph 3.4 of part B, of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*);

"Permitted Variation" means a **tie** Change, a Small Works Change, an Accommodation Works Change, an Infraco Change, a Mandatory **tie** Change and/or a Notified Departure which has been authorised to proceed in accordance with the provisions of this Agreement;

"Persistent Breach Notice" means a notice served by **tie** pursuant to Clause 93 (*Persistent Breach*);

"Phase 1a" means Edinburgh Airport to Newhaven (inclusive), together with the Depot at Gogar and the spur at Roseburn Junction;

"Phase 1b" means Roseburn Junction to Granton Square (inclusive);

"Phase 1b Works" means as the context requires, all or any of the works to be designed, constructed and completed and/or services to be provided and/or the plant, machinery and equipment to be supplied and installed by the Infraco in accordance with this Agreement and which are necessary to deliver Phase 1b, and to subsequently maintain Phase 1b all in accordance with the Employer's Requirements and this Agreement.

"Planned Sectional Completion Date" means each of the following programmed dates of sectional completion for the relevant Section in accordance with this Agreement of the Edinburgh Tram Network as may be amended from time to time in accordance with this Agreement:

- (a) Section A (Depot) - 25 March 2010;
- (b) Section B (Test Track) - 23 April 2010;
- (c) Section C (Testing and Commissioning) - 17 January 2011;

- (d) Section D - the date which falls 26 weeks after the issue of the Certificate of Section Completion in respect of Section C;

"Planned Service Commencement Date" means the date shown in the Programme as the Service Commencement Date as may be amended from time to time and in accordance with this Agreement;

"Planning Permission" means any planning permission, planning approval, approval of reserved matters, listed building consent, conservation areas consent and/or other consent or approval;

"Point of Indexation" shall be January each year to be applied annually as of 1st April each year;

"Position Paper" has the meaning given in paragraph 10.2 of Schedule Part 9 (*Dispute Resolution Procedure*);

"Principal Contractor" has the meaning given to it in the CDM Regulations;

"Prior Approvals" means approvals from CEC planning officers to the appearance of any structures and apparatus (whether temporary or permanent) forming part of the Infraco Works;

"Programme" means the programme set out in Schedule Part 15 (*Programme*) as developed and extended from time to time in accordance with this Agreement which shall include, the Maintenance Programme, the Consents Programme and Design Delivery Programme but shall exclude any programme developed in respect of the completion of any Accommodation Works Changes;

"Prohibited Act" means:

- (a) offering, giving or agreeing to **tie**, the Scottish Executive, Transport Scotland, the Scottish Ministers, CEC or any **tie** Party or any other public body or any person owned or employed by any of them any gift or consideration of any kind as an inducement or reward:
- (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement;

- (b) paying commission or agreeing to pay commission to any person in connection with the award of this Agreement;
- (c) committing any offence:
 - (i) under the Prevention of Corruption Acts 1889-1916 or section 68(2) of the Local Government (Scotland) Act 1973;
 - (ii) under any Law creating offences in respect of fraudulent acts; or
 - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other relevant agreement with **tie**, the Scottish Executive, Transport Scotland, the Scottish Ministers, CEC or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud **tie**, CEC, the Scottish Executive, Transport Scotland, the Scottish Ministers or any other public body;

Any references within this Agreement to any "**Prohibited Act**" shall include acts outwith the United Kingdom and the references within the definition "**Prohibited Act**" to UK legislation shall be deemed to be amended to refer to legislation in other jurisdictions outside of the United Kingdom;

"**Project Development Services**" means the services to be provided by the Operator to **tie** pursuant to and described in the DPOFA as may be amended from time to time;

"**Project IPR**" means any Intellectual Property Rights arising out of, used in or created to implement the Infraco Works and produce Deliverables (including the "Specially Written Software" any asset management system and/or Works programming system) and for the extension of any Edinburgh Tram Network in accordance with this Agreement, but excluding any Infraco IPR contained in the Deliverables and excluding any Tramco Project IPR;

"**Project Operations**" means the performance of:

- (a) the Transport Services on the Edinburgh Tram Network (including the operation of the Control Centre);
- (b) the Operator Maintenance of the Edinburgh Tram Network; and
- (c) all other obligations of the Operator under the DPOFA from time to time;

as may be varied from time to time;

"**Project Safety Certification Committee**" shall include representatives from **tie**, Transport Edinburgh Limited, CEC in its capacity as roads authority, the Infraco, the Operator, Lothian Buses, the SDS Provider, the Tram Supplier and the Tram Maintainer;

"**Project Vision**" has the meaning given in Recital F of this Agreement;

"**Proposals**" means, in relation to each section of OLE forming part of the Edinburgh Tram Network, the Infraco's proposals for the type of supporting infrastructure to be installed in relation thereto, together with any information or documentation which would be reasonably required by **tie** in order to properly evaluate such proposals;

"**Qualifying Change in Law**" means:

- (a) a Discriminatory Change in Law; and/or
- (b) a Specific Change in Law; and/or
- (c) a Change in Law that requires any modification, adjustment or addition to the Infraco Works (as installed) after the Planned Service Commencement Date;
- (d) any alteration or amendment to **tie** and CEC policies set out in Schedule Part 29 (*tie and CEC Policies*);

"**Redevelopment Notice**" has the meaning given in the Building Fixing Agreement;

"**Red Zone Working**" means the term applied to those works carried out on Network Rail infrastructure while traffic is still operating and staff are protected by look-out;

"**Referral**" has the meaning given in paragraph 27 of Schedule Part 9 (*Dispute Resolution Procedure*);

"**Referring Party**" has the meaning given in paragraph 16 of Schedule Part 9 (*Dispute Resolution Procedure*);

"**Regulations**" has the meaning given in Clause 50.1;

"**Related Contract**" has the meaning given in paragraph 55 of Schedule Part 9 (*Dispute Resolution Procedure*);

"**Related Dispute**" has the meaning given in paragraph 55 of Schedule Part 9 (*Dispute Resolution Procedure*);

"Reliability Certificate" means a certificate issued by **tie** in accordance with Clause 47.4;

"Relief Event" means unless any of the following events arise (directly or indirectly) as a result of any act or omission of the Infraco and/or an Infraco Party:

- (a) fire, explosion, lightning, tempest, flood (other than flood caused by bursting or overflowing of apparatus or pipes), earthquakes, or storm, ionising radiation, riot and civil commotion (which results in a Relief Event under the Tram Supply Agreement). For avoidance of doubt "flood" shall exclude flooding affecting any part of the Edinburgh Tram Network caused by weather or local conditions against which the Infraco, acting prudently and reasonably and in accordance with Good Industry Practice, should have protected the Edinburgh Tram Network;
- (b) failure by any Utility to carry out works or provide services which they would ordinarily provide, save to the extent such failure arises from an exercise of rights by such party pursuant to an agreement with the Infraco;
- (c) any accidental loss of or damage to a material part of the Infraco Works;
- (d) protestor action directed against:
 - (i) **tie** or a **tie** Party or the Edinburgh Tram Network which lasts (or the impact of which lasts) for less than 14 days provided such protestor action has not arisen as a result of or been caused by an Infraco breach of its obligations under this Agreement or otherwise by any actions or omissions of the Infraco or Infraco Parties unrelated to the Edinburgh Tram Network; or
 - (ii) a third party unconnected with the Edinburgh Tram Network;
- (e) any official or unofficial strike, lockout, go-slow or other industrial dispute generally:
 - (i) affecting the construction, civil engineering, in the United Kingdom in which a substantial number of the Infraco's employees participate; or
 - (ii) affecting the tram and/or tram manufacturing industry or a significant sector of it save where such events relate to the Tram Supplier's workforce or the workforce of any sub-contractor to the Tram Supplier, in which case they shall not qualify as a Relief Event;

- (f) orders or directions from **tie's** Representative in respect of the removal of unsatisfactory work or materials referred to in Clause 37.5, which are referable to Clause 64 (*Relief Events*);
- (g) the occurrence of a Force Majeure Event;
- (h) an act of terrorism; or
- (i) power failure or bursting or overflowing of apparatus or pipes except in each case where such failure, bursting or overflowing arises from the operations of the Infraco or from a failure of the Infraco's and/or an Infraco Party's plant or equipment and/or any part of the Edinburgh Tram Network itself.

"Remediable Termination Notice" has the meaning given in Clause 90.1.2;

"Repairs Notice" has the meaning given in the Building Fixing Agreement;

"Reporting Period" means a period of 28 days;

"Reporting Period End Date" means any of the dates set out in Schedule Part 35 (*Reporting Period End Dates*);

"Request for Information" shall have the meaning set out in FOISA and shall include any apparent request for information under FOISA, the Environmental Information Regulations or the Code;

"Required Insurances" means the insurances taken out and maintained by the Infraco Members set out in Schedule Part 11 (*Required Insurances*) as may be amended from time to time in accordance with this Agreement;

"Responding Party" has the meaning given to it in paragraph 17 of Schedule Part 9 (*Dispute Resolution Procedure*);

"Retention Bond" means a retention bond provided from time to time by the Infraco to **tie** pursuant to Clause 74 (*Bonds Parent Company Guarantees and Collateral Warranties*), and which shall be substantially in the form set out in Part B of Schedule Part 8 (*Bonds, Parent Company Guarantees and Collateral Warranties*) issued by a surety approved by **tie** in advance in writing, such approval not to be unreasonably withheld or delayed;

"Review Procedure" means the review procedure set out in Schedule Part 14 (*Design Review and Design Management Plan*);

"**RPIX**" means the general index of retail prices for all items excluding mortgage interest payments (Office of National Statistics: Series Identifier: CHMK) as published or any replacement thereof or, in the event such index ceases to exist, such other similar index as the Parties shall agree from time to time (or, if the Parties cannot so agree, as determined under the Dispute Resolution Procedure on the referral of either Party) provided that, if the basis of computation of such index shall have changed between the two relevant months, any official reconciliation between the two bases of computation published by a United Kingdom government department shall be binding on the Parties and, in the absence of such official reconciliation, such adjustment shall be made to the figure of such index for the second of those months to make it correspond as nearly as possible to the method of computation for the first of those months and such adjusted figure shall be considered for the purpose of this Agreement to the exclusion of the actual published figure;

"**Schedule of Rates**" means the rates specified in Schedule Part 4 (*Pricing*);

"**Schedules**" means the Schedule in 44 Parts annexed to the Agreement;

"**Scotland Gas Networks**" means Scotland Gas Networks PLC, a company incorporated under the Companies Act with registered number SC264065 and having its registered office at Inveralmond House, 200 Dunkeld Road, Perth, Perthshire, PH1 3AQ;

"**Scottish Environment Protection Agency**" or "**SEPA**" means a body established under the Environment Act 1995 and having its principal office at Erskine Court, Castle Business Park, Stirling, FK9 4TR;

"**Scottish Natural Heritage**" means a statutory agency whose remit is set out in sections 1, 2 and 3 of the Natural Heritage (Scotland) Act 1991 and having its principal office at 12 Hope Terrace, Edinburgh, EH9 5NP;

"**Scottish Power**" means SP Distribution Limited, a company incorporated under the Companies Act with registered number SC189125 and having its registered office at 1 Atlantic Quay, Glasgow, G2 8SP;

"**Scottish Water**" means Scottish Water Limited, a body established under the Water Industry (Scotland) Act 2002 and having its principal office at Castle House, 6 Castle Drive, Carnegie Campus, Dunfermline, Fife, KY11 8GG;

"**SDS Agreement**" means the agreement between the SDS Provider and **tie** dated 19 September 2005 set out in Schedule Part 22 (*SDS Agreement*) as may be amended by the SDS

Novation Agreement entered into in accordance with Clause 11.1 or from time to time with the approval of **tie** in accordance with this Agreement;

"**SDS Compensation Event**" means Compensation Events (t) and (u);

"**SDS Liability Cap**" means an aggregate amount of ten million pounds (£10,000,000) for each and every event, save in relation to liability for pollution or contamination which is restricted to an aggregate cap of ten million pounds (£10,000,000);

"**SDS Novation Agreement**" means the agreement entered into by the Infraco and the SDS Provider on the same date as the Agreement and included as Schedule Part 23.

"**SDS Provider**" means Parsons Brinckerhoff Limited, a company incorporated under the Companies Act with registration number 02554514 and having its registered office at Amber Court, William Armstrong Drive, Newcastle Business Park, Newcastle Upon Tyne, NE4 7YQ which expression shall include its permitted assignees;

"**SDS Provider Party**" means any sub-consultant, supplier, sub-contractor, specialist and/or any other party appointed by the SDS Provider in accordance with the SDS Agreement to perform any part of the SDS Services;

"**SDS Qualifying Change in Law**" means a Qualifying Change in Law under the SDS Agreement;

"**SDS Services**" means those services to be provided by the SDS Provider in terms of the SDS Agreement and shall exclude any design provided to the MUDFA Contractor in respect of utilities diversions;

"**Second Party**" has the meaning given in Clause 6.3

"**Section**" means any of Section A, Section B, Section C or Section D, all as may be amended from time to time in accordance with this Agreement;

"**Section A**" means completion of the Depot (including energisation) and the first Tram delivered to the Site and assembled and the completion of all tests required by the Employer's Requirements in relation to that Section;

"**Section B**" means completion of the test track (including energisation), assumed as Depot to the airport, and five Trams delivered to the Site and assembled with the first Tram to have completed the Tram Type Test and the remaining Trams to have completed the Tram Commissioning Routine Tests, such tests as described in the Employer's Requirements and the

completion of all tests required by the Employer's Requirements in relation to that Section, including those System Acceptance Tests required to enable the commencement of Driver Training;

"**Section C**" means the carrying out and completion of Phase 1a to Newhaven (including energisation) and the spur or delta at Roseburn Junction and the completion of all tests required by the Employer's Requirements in relation to that Section, including those System Acceptance Tests that must be successfully completed prior to shadow running as provided for in the Employer's Requirements;

"**Section D**" means the completion of shadow running and commencement of revenue service approval obtained and the completion of all tests required by the Employer's Requirements in relation to that Section, including those System Acceptance Tests that must be successfully completed to enable Service Commencement;

"**Section E**" completion of Phase 1b;

"**Section F**" means the carrying out and completion of T1, T2 and T3 in respect of Phase 1b;

"**Sectional Completion Date**" means the date of issue of a Certificate of Sectional Completion for the relevant Section in accordance with this Agreement;

"**Security Interest**" means any mortgage, pledge, lien, hypothecation, security interest or other charge or encumbrance or any other agreement or arrangement having substantially the same economic effect and includes any Security as defined in section 248(b) of the Insolvency Act 1986;

"**Self-Monitoring Plan**" means a detailed plan produced by the Infraco pursuant to Clause 56 setting out how it proposes to monitor its compliance with the Employer's Requirements and its obligations under this Agreement in a way which will enable: (i) the Infraco to produce the Service Quality Reports; (ii) **tie** to satisfy itself as to the level of the Infraco's compliance with the Employer's Requirements and its obligations under this Agreement in all respects; and (iii) the Parties to perform their respective responsibilities pursuant to and as described in Clause 103 (*Best Value*);

"**Service Commencement Date**" means the date of issue of the Certificate of Service Commencement in accordance with this Agreement;

"**Service Quality Report**" means the report to be submitted by the Infraco pursuant to Clause 56 (*Service Performance and Quality Monitoring*) in a form developed and containing the information agreed by the Parties;

"**Site**" means the lands or places on, under, in, or through which the Infraco Works are to be constructed including the Permanent Land and the Temporary Sites, any other lands or places covered by the Land Consents and/or land provided by **tie** for the purposes of the Agreement or any additional land or facilities provided by the Infraco pursuant to Clause 18.19, together with such other places as may be designated in the Agreement or subsequently agreed by the Parties as forming part of the Site;

"**Small Works**" means any change to the Infraco Works or additional works of a similar nature to, or related to, the Infraco Works having an individual cost not exceeding £10,000 (as Indexed) or as otherwise agreed between the Parties from time to time save where such works require the involvement of either the SDS Provider, the Tram Supplier or the Tram Maintainer;

"**Small Works Change**" means any Small Works instructed in accordance with Clause 82 (*Small Works Changes*);

"**Small Works Cost Notice**" has the meaning given in Clause 82 (*Small Works Changes*);

"**Snagging**" has the meaning given in Clause 44.6;

"**Snagging List**" means the list issued by **tie** in accordance with Clause 44.6;

"**Snagging Rectification Certificate**" means a certificate issued under Clause 46 (*Snagging*);

"**Spare Parts**" means such components, parts, consumables, equipment and furnishings as may reasonably be required from time to time to comply with the Infraco's obligations in terms of Clause 52 (*Maintenance*);

"**Spare Parts Pool**" means the pool of Spare Parts and Special Tools owned by **tie** and to be maintained by the Infraco in accordance with Clause 52 (*Maintenance*);

"**Special Tools**" means the special tools, hand tools and test equipment required to carry out maintenance of the Edinburgh Tram Network, listed in the Infraco's Proposals as the same may be varied from time to time by written agreement of the parties (such agreement not to be unreasonably withheld or delayed);

"**Specially Written Software**" means programs which are written by or on behalf of the Infraco specifically to enable the Infraco to carry out its obligations under this Agreement;

"**Specific Change in Law**" means any Change in Law which specifically applies to the provision of works the same as or similar to the Infraco Works but excluding the making, amendment or revocation of any Traffic Regulation Order;

"**Sub-Contractor**" any sub-contractor, sub-consultant, supplier, specialist and/or other party appointed in accordance with Clause 28 (*Subletting and the Appointment of Sub-Contractors*), or otherwise approved by **tie**, and "Sub-Contract" is to be interpreted accordingly;

"**Submitted Item**" has the meaning given in paragraph 1.2 of Schedule Part 14 (*Review Procedure and Design Management Plan*);

"**Successor Infraco**" means any person or persons notified by **tie** to the Infraco as having been, or intended to be, appointed to complete any part of the Infraco Works and/or maintain any part of the Edinburgh Tram Network following termination or expiry of this Agreement;

"**Systems Acceptance Tests**" means the tests described in the Employer's Requirements including tests T1, T2, T3, T4 and/or T5, and the other testing and commissioning activities described in Schedule Part 2 (*Employer's Requirements*);

"**Systems Availability Target**" has the meaning given in Schedule Part 2 (*Employer's Requirements*);

"**Technical Library**" has the meaning given to it in Clause 102.17(a);

"**Technical Records**" means the technical records in respect of the Edinburgh Tram Network to be retained and updated in accordance with the Maintenance Specification and the Employer's Requirements;

"**Telewest**" means either or both of Telewest Limited and Telewest Communications;

"**Telewest Communications**" means Telewest Communications Group Limited, a company incorporated under the Companies Act with registered number 02514287 and having its registered office at 160 Great Portland Street, London, W1W 5QA;

"**Telewest Limited**" means Telewest Limited, a company incorporated under the Companies Act with registered number 03291383 and having its registered office at 160 Great Portland Street, London, W1W 5QA;

"**Temporary Works**" means all temporary works of every kind required in or about the construction and completion of the Infraco Works;

"**Temporary Sites**" means any of the sites shown highlighted in red on the plans set out in Schedule Part 31 (*Drawings*);

"**Term**" means the period from (and including) the Effective Date until (and including) the earlier of the Termination Date and the Expiry Date;

"**Termination Date**" means the date of early termination of this Agreement in accordance with Clauses 3 (*Conditions Precedent*), 88 (*Termination or Suspension for tie Default*), 89 (*Voluntary Termination by tie*), 90 (*Termination on Infraco Default*), 91 (*Termination by Reason of Force Majeure*), 92 (*Termination for Corrupt Gifts and Fraud*) or 93 (*Persistent Breach*);

"**Termination Notice**" means a notice to terminate this Agreement served by either Party in accordance with the terms of this Agreement;

"**T1**" means the post commissioning test described in section 23 of Schedule Part 2 (*Employer's Requirements*);

"**T2**" means performance test 1 described in section 23 of Schedule Part 2 (*Employer's Requirements*);

"**T3**" means the pre-operations test described in section 23 of Schedule Part 2 (*Employer's Requirements*);

"**T4**" means the network performance test described in section 23 of Schedule Part 2 (*Employer's Requirements*);

"**T5**" means the network reliability test described in section 23 of Schedule Part 2 (*Employer's Requirements*);

"**Test Track**" means that portion of the Infraco Works that will be utilised by the Infraco to test run Trams and systems and to train drivers and other staff;

"**Third Party Obligations**" means the obligations which Infraco is obliged to comply with under Clauses 18.17A and B and set out in Schedule Part 13 (*Third Party Agreements*) as that Schedule Part 13 may be amended from time to time as a result of a **tie** Change;

"**Third Party Software**" means programs, the Intellectual Property Rights in which are:

- (a) owned by a third party; and
- (b) used by the Infraco to carry out its obligations under this Agreement;

"**Thus**" means means Thus PLC, a company incorporated under the Companies Act with registered number SC 192666 and having its registered office at 1-2 Berkeley Square, 99 Berkeley Street, Glasgow, G3 7HR;

"**tie and CEC Polices**" means the policies included in Schedule Part 29 (*tie and CEC Policies*);

"**tie Change**" means any addition, modification, reduction or omission in respect of the Infraco Works instructed in accordance with Clause 80 (*tie Changes*) or any other event which this agreement specifically states will be a **tie Change** but which shall not include any Small Works Change or any Accommodation Works Change;

"**tie Change Order**" means the written confirmation issued by **tie** to proceed with a **tie Change** on the basis of an Estimate (as modified, if required);

"**tie Consents**" means securing the Traffic Regulation Orders and Temporary Traffic Regulation Orders in accordance with Clause 19.1 together with such other Consents that relate to the statutory authority to implement the Edinburgh Tram Network, but excluding all Design Stage Consents.

"**tie Customer Satisfaction Survey**" means the customer satisfaction survey produced annually (or with such other frequency as may be agreed between the Infraco and **tie**) in accordance with Clause 73.3;

"**tie Default**" means one of the following events:

- (a) the failure of **tie** for more than 30 days following the final date for payment to pay to the Infraco an amount in excess of £250,000 which has been certified for payment pursuant to Clause 67.5 or Clause 68.4 except where **tie** has exercised contractual rights of set-off or retention as provided for in this Agreement, including pursuant to Clauses 37.2, 38.2, 38.3, 44.5, 45.5, 67.14, 67.15, 68.12, 68.13, 69.4, 96.4.3 or Schedule Part 43;
- (b) a breach by **tie** of any of its material obligations under this Agreement which substantially frustrates or renders it impossible for the Infraco to perform any material

part of its obligations under this Agreement for a continuous period of 45 Business Days;

- (c) an Insolvency Event in relation to **tie**;
- (d) breach by **tie** of Clause 98; or
- (e) Change in Law which makes completion of or carrying out of a material part of the Infraco Works either impossible or illegal

"**tie DPOFA Change**" means a change proposed by **tie** in accordance with the DPOFA;

"**tie's Drug and Alcohol Policy**" means the policy included in Schedule Part 29 (*tie and CEC Policies*);

"**tie Notice of Change**" means a notice service by **tie** pursuant to Clause 80 (*tie Changes*), setting out the matters referred to in Clause 80;

"**tie Obligations**" means the obligations which **tie** is required to perform under this Agreement which are set out in Schedule Part 26;

"**tie Party**" means any advisers appointed by **tie** and/or any of **tie's** employees, agents, contractors and sub-contractors and its or their directors, officers and employees (but excluding the Infraco and/or any Infraco Party);

"**tie's Representative**" means the person or persons appointed by **tie** from time to time and notified to the Infraco;

"**Timetable**" means the timetable which is developed in accordance with Schedule Part 2 (*Employer's Requirements*) as may be amended from time to time;

"**TOC**" means (passenger) train operating company;

"**Traffic Regulation Orders**" means the traffic regulation orders required for the operation and maintenance of the Edinburgh Tram Network;

"**Tram Commissioning Routine Tests**" means together the site commissioning tests and the system integration tests to be carried out on the System and on each Tram as set out in section 23 of Schedule 2 (*Employer's Requirements*);

"**Tramco IPR**" means the Tram Supplier IPR as such term is defined in the Tram Supply Agreement and the Tram Maintainer IPR as such term is defined in the Tram Maintenance Agreement;

"**Tramco Project IPR**" means all Intellectual Property Rights created in the performance of the Tram Supplier's obligations pursuant to the Tram Supply Agreement and the Tram Maintainer's obligations pursuant to the Tram Maintenance Agreement relating to aesthetic and ergonomic detailed design and which are specific in nature to the performance of the Tram Supplier's obligations pursuant to the Tram Supply Agreement and the Tram Maintainer's obligations pursuant to the Tram Maintenance Agreement;

"**Trams**" means all or any of the tram vehicles for the Edinburgh Tram Network to be provided under the Tram Supply Agreement and maintained under the Tram Maintenance Agreement;

"**Tramstop**" means the places (including termini) at which fare paying passengers are permitted to board and/or leave Trams;

"**Tram Inspector**" means the person specified as such in the Tram Inspector Agreement;

"**Tram Inspector Agreement**" means the agreement between the Tram Inspector, **tie** and the Infraco for the inspection and certification of Trams which shall be substantially in the form set out in Schedule Part 34 (*Tram Inspector Agreement*);

"**Tram Legislation**" means 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 and which confer on CEC all requisite authorities and statutory powers to procure the construction, operation and maintenance of the Edinburgh Tram Network;

"**Tram Maintenance Commencement Date**" shall have the meaning given to it pursuant to the Tram Maintenance Agreement;

"**Tram Maintainer**" means the party appointed to carry out the Tram Maintenance Services in accordance with the Tram Maintenance Agreement;

"**Tram Maintenance Agreement**" means the agreement awarded to the Tram Maintainer in respect of the Tram Maintenance Services set out in Schedule Part 19 (*Tram Maintenance Agreement*) as may be amended from time to time with the approval of **tie** in accordance with this Agreement;

"Tram Maintenance Plan" means the maintenance plan to be prepared by the Tram Maintainer in accordance with the Tram Maintenance Agreement;

"Tram Maintenance Qualifying Change in Law" means a Qualifying Change in Law pursuant to the Tram Maintenance Agreement;

"Tram Maintenance Services" means the ongoing maintenance of the Trams, supply of consumable spares for the Trams, the provision of any associated services and other obligations incumbent on the Tram Maintainer (excluding the Tram Supply Obligations) as described in the Tram Maintenance Agreement;

"Tram Maintenance Services Payment" means the payment to be made to the Infraco in respect of the performance of the Tram Maintenance Services in accordance with this Agreement. This payment shall be based on the sums set out in Schedule Part 4 (*Price*) and the final amount to be paid in each Reporting Period to the Infraco shall be calculated in accordance with Clause 68 (*Payment in Respect of Maintenance Services*) and part B of Schedule Part 6 (*Maintenance Payment Regime*).

"Tram Milestone" means any milestone which has been identified and defined as a "tram milestone" in Schedule Part 5 (*Milestone Payments*);

"Tram Milestone Completion Certificate" means a certificate to be issued in respect of a milestone completed by the Tram Supplier;

"Tram Related Equipment" means the Spare Parts and Special Tools (which are required specifically in relation to the Trams) and the documentation, specifications, instructions, catalogues, spare parts list, training and maintenance manuals and log books and Tram Software listed in Part 2 of Schedule Part 2 (*Employer's Requirements*);

"Tram Requirements Specification" means Section 24 of Schedule Part 2 (*Employer's Requirements*);

"Tram Software" means the executable object code version of software relating to equipment installed on the Trams, which is supplied in machine readable form and already loaded upon the relevant piece of equipment or computer system to which it relates, including for the avoidance of doubt all software embedded in a hardware device which is installed on the Trams;

"Tram Supplier" means the party appointed by **tie** to carry out the Tram Supply Obligations in accordance with the Tram Supply Agreement;

"Tram Supply Advance Works Agreement" means the agreement entered into between **tie** and the Tram Supplier on 18 December 2007;

"Tram Supply Agreement" means the agreement awarded by to the Tram Supplier in respect of the Tram Supply Obligations set out in Schedule Part 16 (*Tram Supply Agreement*) as may be amended from time to time with the approval of **tie** in accordance with this Agreement;

"Tram Supply Protestor Action" means any action occurring in Edinburgh or whilst undertaking the delivery of trams within Scotland, directed against **tie** or a **tie** Party or the Edinburgh Tram Network which affects the performance of the Tram Supplier's obligations under the Tram Supply Agreement and has not arisen as a result of or been caused by the Tram Supplier's breach of its obligations under the Tram Supply Agreement or otherwise by any action or omission of the Tram Supplier unrelated to the Edinburgh Tram Network;

"Tram Supply Qualifying Change in Law" means a Qualifying Change in Law pursuant to the Tram Supply Agreement;

"Tram Supply Obligations" means the design, manufacture and supply of the Trams, and supply of documentation, capital spares, special tools and any associated equipment, the provision of services and other obligations incumbent on the Tram Supplier (excluding the Tram Maintenance Services) as described in the Tram Supply Agreement;

"Tram Type Test" means any of the Type Tests as defined in Schedule Part 16 (*Tram Supply Agreement*);

"Transport Edinburgh Limited" or **"TEL"** means Transport Edinburgh Limited a company incorporated under the Companies Act with registered number SC269639 and having its registered office at 55 Annandale Street, Edinburgh, EH7 4AZ;

"Transport Scotland" means an agency within the Scottish Executive Enterprise, Transport and Lifelong Learning Department which was established in January 2006 and having its principal office at Buchanan House, 58 Port Dundas Road, Glasgow, H4 0HF;

"Transport Services" means the public passenger transport services to be provided by the Operator on the Edinburgh Tram Network (or any part thereof) in accordance with the DPOFA;

"TTROs" means temporary traffic regulation orders;

"TUPE Information" has the meaning given in Clause 58.1

"**TVM**" means ticket vending machine (automatic or manual);

"**Underperformance Warning Notice**" means a notice issued to the Infraco by **tie** pursuant to Clause 56.7.2;

"**UTC**" means urban traffic control;

"**Utilities**" means BT, Easynet, NTL, Scottish Water, Scotland Gas Networks, Cable and Wireless, Forth Ports, Ocean Terminal, Scottish Power, Telewest and Thus and their successors, permitted assignees and transferees and "**Utility**" shall be construed accordingly;

"**Utilities Information**" means the data, information, plans, drawings, surveys, reports, renewals programmes, estimates, technical schedules contained in part B of Schedule Part 41 (*Ground Conditions and Utilities Information*) which relate to the existence, location, type, extent, use and serviceability of any utility apparatus or equipment;

"**Utilities Works**" means any works carried out, or to be carried out, by the Utilities or any other public utility company under contract with **tie** relative to the MUDFA Works;

"**Works Breakdown Structure**" or "**WBS**" means the works breakdown structure set out in Schedule Part 2 (*Employer's Requirements*);

"**Work Site**" means any work site within any part of the Infraco Works; and

"**Work Site Completion Certificate**" has the meaning given in paragraph 3.7.1 of part A of Schedule Part 3 (*Code of Construction Practice and Code of Maintenance Practice*).

"**9th May 2008 Agreement**" means the agreement of that date signed by **tie** Limited and both Infraco Members;

2. Unless the context requires otherwise:

2.1 words importing gender include masculine, feminine and neuter;

2.2 the singular includes the plural, and vice versa;

2.3 a reference to any Clause, Sub-Clause or Schedule is, except where it is expressly stated to the contrary, a reference to such Clause, Sub-Clause or Schedule to this Agreement;

- 2.4 a reference in any Schedule to any part, paragraph or sub-paragraph is, except where it is expressly stated to the contrary, a reference to such part, paragraph or sub-paragraph of that Schedule (as the case may be);
- 2.5 any reference to this Agreement or to any other document shall include any variation, amendment, or supplement to this Agreement or such other document as expressly permitted under the terms of this Agreement;
- 2.6 any reference to any enactment, draft enactment, order, regulation or other similar instrument (including any EU instrument) (whether specifically named or not) shall be construed as a reference to the enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted and shall include any orders, consents, regulations, legally binding codes of practice or subordinate legislation (within the meaning of section 21(1) of the Interpretation Act 1978) made thereunder;
- 2.7 a reference to a person includes individuals, firms, partnerships, bodies corporate, joint ventures, government departments and any organisation capable of suing or being sued and references to any of the same include the others and their successors and assignees and transferees;
- 2.8 the *ejusdem generis* rule does not apply and the meaning of general words is not to be restricted by any particular examples preceding or following those general words;
- 2.9 a reference to a time of day is a reference to the time in Scotland;
- 2.10 subject to the restrictions imposed by this Agreement on subcontracting, an obligation to do something includes an obligation to procure it to be done;
- 2.11 an obligation not to do something includes an obligation not to wilfully allow it to be done;
- 2.12 the word "**including**" means "**including without limitation**";
- 2.13 a reference to "**consent**" shall mean consent in writing;
- 2.14 the headings, contents lists and marginal notes in the Agreement shall not be deemed to be part thereof or be taken into consideration in the interpretation or construction thereof or of the Agreement;
- 2.15 The word "**cost**" and words "**direct cost**" or any phrase analogous thereto when used in the Agreement shall include all expenditure properly incurred or to be incurred

whether on or off the Site including overheads, finance and other charges properly allocatable thereto;

2.16 communications which under the Agreement are required to be "in writing" may be handwritten, typewritten or printed and sent by hand, post, email, facsimile or other means resulting in a permanent record;

2.17 any reference to any Deliverable or course of action being reviewed, approved, agreed, consented to or otherwise processed in accordance with this Agreement, means that the provisions of Schedule Part 14 (*Review Procedure and Design Management Plan*) shall apply except where otherwise agreed in writing by **tie**; and

2.18 references to "traffic management" and "Temporary Traffic Regulation Orders" (TTROs) shall be deemed to include the requirements of EAL, Forth Ports and any other third party relating to road closures and procedures.

3. Where a Party comprises two or more persons:

3.1 any obligations on the part of that party contained or implied in this Agreement are deemed to be joint and several obligations on the part of those persons; and

3.2 references to that party include references to each and any of those persons.

4. The language of this Agreement is English. All 'as built' drawings, system integration documentation and technical data, operating and maintenance instructions and manuals, warranty documentation, Spare Parts information, identification labels, programmes and other written and printed matter required in respect of the Infraco Works and the subsequent operation and maintenance of the Edinburgh Tram Network which are to be provided by the Infraco in accordance with this Agreement, shall be in English.