

LEGALLY PRIVILEGED AND CONFIDENTIAL KEY TERMS OF REVISED CONTRACTUAL ARRANGEMENTS

1. The Mar Hall Settlement

- 1.1 tie and the Bilfinger Berger ("**BB**"), Siemens and CAF consortium ("**Infraco**") are party to an agreement (the "**Infraco Contract**") for the design, construction and maintenance of the Edinburgh tram system, and the supply and maintenance of 27 tram vehicles. Infraco and CAF are also party to a Tram Supply and a Tram Maintenance Agreement (the "**Tram Agreements**").
- 1.2 Following mediation at Mar Hall in March 2011, CEC, tie and Infraco have reached agreement in principle to settle existing disputes and proceed with the works under the Infraco Contract on the following headline terms (the "**Mar Hall Settlement**"):
- (a) the scope of the works to be carried out by the Infraco will be restricted to the section from the Airport to St Andrew Square;
 - (b) the Infraco will complete the integrated design from the Airport to Newhaven;
 - (c) a total price of £362,500,000 has been agreed for the off-street section of the works ("**Off-Street Works**"), from the Airport to Haymarket. This includes the priority works presently being carried out as reported to Council on 16 May 2011;
 - (d) the Infraco will carry out the necessary remediation works in Princes Street at no additional cost to tie/CEC;
 - (e) the price for the on-street works from Haymarket to St Andrew Square ("**On-Street Works**") is not included in the lump sum price set out in (c) above and is to be agreed as set out below. The objective of the mechanism for agreeing the price is to enable a greater degree of price certainty to be obtained before proceeding with the proposed arrangements;
 - (f) the price for the Off-Street Works set out in (c) above will not include any enabling works agreed to be carried out in respect of the Edinburgh Gateway Interchange, for which any programme changes and an additional price will require to be agreed;
 - (g) the price set out in (c) above does not include the remaining sum of £[●] to be paid to CAF for the tram vehicles. A further agreed sum of €5.1 million is to be paid to CAF in full and final settlement of their entitlement to delay costs;
 - (h) all historic claims under the Infraco Contract were agreed to be settled as part of the Mar Hall Settlement;
 - (i) subject to CEC being satisfied that all responsibility for successful system integration and performance remains with the Infraco, the Tram Agreements will be novated from Infraco to CEC and CAF will be removed as a party to the Infraco Contract; and
 - (j) following novation, tie will be responsible for procuring the trams from CAF and making them available to BB and Siemens. BB and Siemens will however retain responsibility to integrate the trams and to deliver system performance. It will be necessary for CAF and BB/Siemens to enter into a direct agreement (the "**Interface Agreement**") preserving CAF's current design/system integration obligations to the extent not satisfied by the delivery of the trams.

- 1.3 The parties have agreed in principle (subject to formal BB/Siemens sign-off) to work together on an open-book basis, to agree a price with the sub-contractors for each package of works forming part of the On-Street Works, based on an agreed set of design drawings and an agreed programme. When agreed, these sums will be aggregated and an agreed overhead and profit fee and preliminaries fee will be added to form the contract price for the On-Street Works ("**On-Street Contract Price**").
- 1.4 It is important to note that the On-Street Contract Price will be subject to variation in the event of a departure from certain agreed pricing assumptions or other delay (such as utilities) for which BB/Siemens are also entitled to an extension of time. Detailed rates and prices to be used in calculating any variation to the On-Street Contract Price will be agreed between the parties. The variation mechanism will require BB/Siemens to continue with the works whilst variations are being valued.
- 1.5 The pricing variation mechanism outlined above will cease to apply in the event that the aggregate value of claims submitted for payment but which are unpaid exceeds £[750,000] or the aggregate outstanding extension of time claims exceeds [21 days]. In that event, the On-Street Works will proceed on a reimbursable cost basis, entitling BB/Siemens to be paid their actual costs (less certain disallowable costs), calculated by reference to an agreed schedule of rates. In these circumstances, the levels of liquidated damages and related liability cap will also reduce to levels to be agreed.
- 1.6 If the cost of the On-Street Works following transfer to a reimbursable cost basis exceeds a pre-agreed amount, tie/CEC is pressing to have a right to terminate the Infraco Contract unilaterally. If tie/CEC exercise that termination option, BB/Siemens will be entitled to a pre-agreed compensation payment. At present BB/Siemens are suggesting that the right to terminate be limited to the On-Street Works only. BB/Siemens are also pressing for a right to suspend if claims unpaid exceed a threshold to be agreed.
- 1.7 It should be noted that any variation to the On-Street Contract Price following a departure from the pricing assumptions could impact on the agreed programme for the Off-Street Works which would give rise to a claim for prolongation costs in respect of the Off-Street Works.

2. **Settlement Agreement**

- 2.1 If approved by Council, CEC, tie and the Infraco are aiming to enter into a settlement agreement ("**Settlement Agreement**") governing the proposed revised contractual arrangements to implement the Mar Hall Settlement by end July 2011.
- 2.2 CEC is unlikely to be certain that it will have funding available to complete the revised arrangements, until later in the summer. The Settlement Agreement will therefore be conditional on CEC confirming that it has obtained the necessary funding (the "**Funding Condition**"). If the Funding Condition is not satisfied before 5pm on 1 September 2011, then save as provided at 2.6 below, the Settlement Agreement will not come into effect.
- 2.3 The Settlement Agreement would on satisfaction of the Funding Condition:
- (a) novate the Tram Agreements from Infraco to CEC with certain amendments;
 - (b) remove CAF as a party to the Infraco Contract;
 - (c) settle existing claims in relation to the Tram Agreements and the Infraco Contract;
 - (d) make certain amendments to the Infraco Contract to implement the Mar Hall Settlement;
 - (e) make the necessary changes to the Employer's Requirements to reflect the reduction in scope and the novation of the Tram Agreements;

- (f) oblige Infraco and CAF to enter into the Interface Agreement.
- 2.4 Where the Funding Condition is not satisfied by 5pm on 1 September 2011, it has been agreed that:
- (a) the Tram Agreements will still be novated from Infraco to CEC in a form to be agreed and CEC will accept delivery of the remainder of the 27 trams under the Tram Supply Agreement; and
 - (b) the Infraco Contract is to be terminated automatically. An agreed sum will be paid to the Infraco in full and final settlement of all outstanding claims and entitlements accrued up to the date of termination [with the exception of any claims agreed to be excluded].
- 2.5 Under MoV4 which was signed following the Mar Hall Settlement, where the Settlement Agreement is not signed on or before 1 July 2011:
- (a) on an unconditional basis; or
 - (b) on a conditional basis subject to funding being available,
- because tie and/or CEC do not have sufficient funding to meet tie's obligations under the Infraco Contract, the following provisions apply:
- (i) Infraco is required to continue to carry out and receive payment for the priority works, but there is no requirement on the Infraco to carry out any other works under the Infraco Contract;
 - (ii) The Infraco Contract will automatically terminate;
 - (iii) Parties are to discuss separation terms; and
 - (iv) The Infraco will continue to transfer ownership of and receive payment for the Siemens materials and equipment to the Council.
- 2.6 Where the Settlement Agreement is not signed on or before 1 July 2011 for reasons other than lack of availability of funding, the following provisions apply:
- (i) Infraco's obligation to perform the priority works ceases;
 - (ii) Infraco works under the existing Infraco Contract are to recommence;
 - (iii) Infraco will continue to transfer ownership of and receive payment for the Siemens materials and equipment to the Council.

3. **Current status of negotiations**

- 3.1 There are a number of outstanding issues that remain to be resolved before the Settlement Agreement and Interface Agreement can be signed:
- (a) the terms for settlement of historic claims are to be clarified and agreed;
 - (b) a number of amendments require to be made to change the risk allocation in the Infraco Contract in order to reflect the agreed principle of price certainty for the Off-Street Works. The principle is clearly agreed and understood, but the terms of the detailed changes have yet to be agreed between the parties;
 - (c) changes will require to be made to the Tram Agreements as a consequence of the novation to CEC and these have still to be agreed by the parties;

- (d) CAF and Siemens have been unable to agree the terms of the Interface Agreement which will determine the division of their responsibilities for system integration. This has greatly protracted the settlement discussions. The outstanding matters referred to at 2.3(a) to (c) above in relation to the Settlement Agreement cannot be finalised until the issues on the Interface Agreement have been resolved. We are presently monitoring the situation and assisting in the discussions where possible, but if CAF and Siemens are unable to agree this issue without further delay, CEC will have no option but to withdraw the novation option and proceed with CAF remaining as a member of the Infraco; and
- (e) further diligence requires to be carried out in relation to any procurement issues which may or may not arise out of the proposed arrangements.

3.2 As set out in 2.5 and 2.6 above, the deadline in MOV4 for signature of the Settlement Agreement is 1 July 2011. This will require to be extended by agreement of the parties in order to allow sufficient time for the issues set out in 3.1 above to be resolved. It is proposed that the date should be extended to 31 July 2011.

23 June 2011