

Memorandum of Understanding

This Memorandum of Understanding ("MoU") is made made the _____ day of _____
2009. ENGLISH FORMAT NOT APPROPRIATE IN SCOTS DOCUMENTS
MINUTE OF AGREEMENT

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BETWEEN

BILFINGER BERGER UK LIMITED a company incorporated in England and Wales under number 02418086 and having its registered office at 7400 Daresbury Park, Warrington, Cheshire, WA4 4BS ("BBUK") which expression shall include its successors, permitted assignees and transferees; and

~~SIEMENS PLC, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Street, Frimley, Camberley, Surrey, GU16 8QD ("Siemens") which expression shall include its successors, permitted assignees and transferees, and~~

Comment [MBE1]: My recommendation is that Siemens does NOT sign this agreement with SDS (or, PB), but that we produce a separate agreement between Siemens and BBUK by which Siemens guarantees to BB specific support (timely supply of inputs, and even some payment for "acceleration" of certain SDS deliverables which are key to Siemens, but conditioned to specific timely performance of SDS).

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PARSONS BRINCKERHOFF LIMITED a company registered in England (registered number 2554514) whose registered office is Amber Court, William Armstrong Drive, Newcastle Business Park, Newcastle upon Tyne, NE4 7YQ. (hereinafter referred to as "PB" or "SDS Provider") which expression shall include its successors, permitted assignees and transferees

WHEREAS

~~BBUK requires the SDS Provider to provide some additional design services and resource in connection with the completion of the design for the Edinburgh Tram Network in order to comply with Infraco's duty to mitigate under the Infraco Contract and SDS have agreed to provide those services and Siemens areis the managing party parties of the Infraco, which in turn entered into an agreement with tie on 14 May 2008 for the design, construction, testing, commissioning and maintenance of the Edinburgh Tram Network (the Project) for tie LIMITED (hereinafter referred to as "tie") a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh EH1 1YJ.~~

A. PB entered into an agreement with tie on 19 September 2005 (the SDS Agreement), where PB was appointed as the SDS Provider to provide the system design services in connection with the Edinburgh Tram Network

Comment [MBE2]: You should check if this is legally correct. PB might be the managing party of SDS, but PB is not SDS.

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B. tie and Infraco agreed, with the consent of PB, that the Infraco take over the rights and liabilities of tie under the SDS Agreement by novating the SDS Agreement from tie to Infraco on 14 May 2008 (the SDS Novation Agreement).

C. B. ~~In order to comply with Infraco's duty to mitigate under the Infraco Contract* BBUK requires the SDS Provider to provide additional resource in connection with the completion of the design for the Edinburgh Tram Network and SDS have agreed to provide those additional resources. BBUK and Siemens requires completion of the design for the Edinburgh Tram Network to enable BBUK and Siemens Infraco to commence (and complete) the construction, testing, commissioning and maintenance of the Project.~~

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NOW, it is hereby agreed as follows:

1. This agreement comprises:

- 1.1 This Memorandum of Understanding; Clauses 1 - 20
- 1.2 **Appendix 1** - Information Requirements;
- 1.3 **Appendix 2** - Design Basis Assumptions;
- 1.4 **Appendix 3** - Schedule of Identified Design Changes not yet instructed by tie;
- 1.5 **Appendix 4** - Design Completion Schedule;
- 1.6 **Appendix 5** - Remuneration Matrix;
- 1.7 **Appendix 6** - Progress Monitoring and Payment Mechanism;

The following words and phrases shall have the following meanings for the purposes of this Agreement:

"Design Deliverable Package" means each group of design deliverables making up each of the design deliverable packages set out in the Design Completion Schedule.

"Design Milestone Targets" means the targets set out in the Design Completion Schedule.

~~2. PB have the required personnel available and is ready, willing, and able to provide the necessary services for the shall provide such additional resource as may be required to complete and shall (i) complete each of the Design Deliverable Packages completion of the design for the Edinburgh Tram Network and (ii) achieve each of the Design Milestone Targets, by the date set out in the Design Completion Schedule, all in accordance with the process set out in Appendix 6 (Progress Monitoring and Payment Mechanism) on the terms and conditions set forth out in the SDS Agreement and as and the SDS Novation Agreement, according to the SDS Design Completion Programme and Remuneration Matrix attached herein.~~

~~3. This MoU addresses the completion of the SDS Provider's Design Deliverables for the Project (Design Completion), in accordance with the terms and conditions of the SDS Agreement and the SDS Novation Agreement, save contained within as where explicitly amended by this MoU including Appendices.~~

~~4. Other than as expressly provided in Clause 14 tThis MoU Agreement does not alter, alter amend or otherwise operate as a waiver by either Party of the rights and/or obligations of either Party under the SDS Agreement and/or the SDS Novation Agreement which shall continue in full force and effect notwithstanding the terms of this Agreement, the scope of the SDS Provider's services to any extent other than expressly provided herein. Any and all rights and obligations of the Parties not~~

Comment [MBE3]: In the opinion of Siemens, the Design Completion Schedule needs to be completed by a more exact list of which deliverable will be in which package. Otherwise there is risk of SDS delivering only incomplete packages to meet a payment milestone, and later contend, other related drawings would never have been meant to be part of the package in the first place, and need extra money and time.

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Comment [MBE4]: Essentially we are only changing the delivery programme against some extra remuneration. The terms and conditions of the SDS Ag/NovAg shall otherwise PREVAIL. We suggest these changes in the wording, to avoid any later interpretation that the signature of the MoU would have overruled any of the terms and conditions of SDS Ag/NovAg.

Comment [MW5]: The Design Deliverable should include DWG files at the time of submission from SDS. As well should all related Risk assessments and Hazard related documentation be provided at the same time.

~~expressly modified by this MoU remain as per the SDS Agreement and the SDS Novation Agreement.~~

5. The Parties acknowledge that at the date of execution of this ~~MoU Agreement~~, there is information and/or design input required by each Party ~~[and Siemens]~~ to facilitate the performance of ~~the~~ respective obligations by the remaining Parties. This information and/or design input, along with the responsible Party and the due date is provided at **Appendix 1**.

6. All Parties acknowledge that failure to comply with the provisions of **Appendix 1** may prevent the successful achievement of the ~~Design Completion Dates~~ ~~design completion dates~~ ~~Design Milestone Targets for specific packages of the Design Deliverable Packages~~ as per **Appendix 4**, ~~to the extent that the party receiving any given information later than stipulated in Appendix 1 would be able to prove, to the reasonable satisfaction of the other party, a specific cause/effect dependency between the late received input of Appendix 1 and the late completion date of one or several specific packages per Appendix 4.~~

7. It is accepted by the Parties that to fix the terms of this ~~MoU Agreement~~ against a developing factual background, Design Basis Assumptions have been agreed as provided at **Appendix 2**.

8. ~~The Parties acknowledge that in order to complete the achieve the Design Completion Deliverable Packages and achieve the Design Milestone Targets by the dates set out in Appendix 4, it is necessary to consider certain items that have been identified by the SDS Provider as being Changes to their original scope a variation to the Services. These items together with theirthe SDS Provider's assessed value are listed in Appendix 3.~~

9. ~~It is acknowledged by the Parties that BBUK and Siemens havehas agreed only to a without prejudice commercial settlement for these scope changes in accordance with Appendix 3 to facilitate the execution of this MoU.~~

~~10.9.~~
11.10. ~~In order to allow the Design Deliverable Packages to be completed in the absence of agreement between the Parties as to whether or not the items set out in Appendix 3 are variations to the Services to be provided by the SDS Provider under the SDS Agreement, eEach item identified by the SDS Provider is categorised in Appendix 3 as follows:~~

Type A: ~~Changes accepted in principle for which the Parties~~ BBUK shall pay the SDS Provider ~~have agreed to a guaranteed remuneration percentage of 100% of the amount contained in Appendix 3 plus the balance of any greater amount eventually instructed by tie~~ which SDS may eventually be entitled to recover from Infracore under the SDS Agreement

Type B: ~~Changes requiring further clarification for which the Parties have agreed~~ BBUK shall pay ~~to a guaranteed remuneration of 75% of the amount contained in Appendix 3 plus the balance of any greater amount which SDS may eventually be entitled to recover from Infracore under the SDS Agreement~~ eventually instructed by tie.

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Comment [MBE6]: The intent of these changes is to narrow down the risk of allegations that any late input might be taken as an excuse to justify delay of possibly unrelated outputs.

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Comment [MBE7]: Certainly Siemens has no say, nor desires involvement, in such clarifications and/or settlements between BBUK and SDS for alleged Civil Design changes. SDS is the Civil Designer, and within the Consortium BBUK is responsible for the Civil Design. This is one of the main reasons Siemens prefers not to sign this agreement, but rather a side agreement with BB regulating separately the "deals" between Siemens and SDS on this matter.

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- 10 It is acknowledged by the Parties that the payments which BBUK has agreed make under Clause 9 above are without prejudice to its rights under the SDS Agreement
- 11: The SDS Provider acknowledges that in order for the remaining parties Infraco to be able to pursue their entitlements towards tie, under the Infraco Contract in respect of the items identified in Appendix 3 they rely on the SDS Provider's ability to substantiate the Changes variations it is claiming for and the SDS Provider agrees to confirm its commitment to take all measures and provide all information which Infraco may require to obtain tie's acceptance of the corresponding Changes included in that the items in **Appendix 3** are tie Changes under the Infraco Contract.
- 12:11 The SDS Provider shall provide all Design Deliverables in accordance with **Appendix 4** and **Appendix 6**.
- 13:12 The SDS Provider shall receive remuneration in those amounts detailed in **Appendix 5**, as follows:
- Item 5.1: subject to achievement of the milestones defined in **Appendix 4** and fulfilment of the requirements included in **Appendix 6**: and
 - Item 5.2: in accordance with the SDS Agreement and SDS Novation Agreement.
- 14:13 The remuneration detailed in **Appendix 5** represents the SDS Provider's the sole entitlement under this MoU Agreement and the SDS Provider acknowledges and agrees that no additional claims for payment will be made in connection with the provision of its services under this MoU Agreement, and waives its rights to any payment it would otherwise have been entitled to in respect of such services under the SDS Agreement and SDS Novation Agreement.
- 15:14 Monitoring of the process, agreement of milestone achievement, payment of remuneration and the resolution of any disagreements shall be undertaken by the Supervising Committee in accordance with **Appendix 6**.
- 16:15 The Parties shall undertake milestone achievement reviews at the end of each milestone period as defined in **Appendix 4**.
- 17:16 The Parties shall review satisfactory achievement of the objectives of this MoU Design Milestone Targets at the end of every second milestone period NOT SURE WHAT A PERIOD IS? and shall agree to continue or terminate the SDS Provider's services under this MoU Agreement. This Agreement shall be terminated only by the written agreement of both Parties. action shall be confirmed by written notice.
- 18:17 In the event of such termination in accordance with paragraph 17, the termination shall be with immediate effect and the SDS Provider shall be entitled to receive only that remuneration already certified.
- 19:18 The SDS Provider acknowledges and agrees that it shall not be entitled to any additional entitlements resulting from termination of this MoU Agreement in accordance with paragraph 17.

Comment [MBE8]: Same comment. Not a Siemens decision, nor involvement.

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Comment [MW9]: All Design Deliverables (ICF Drawings) shall be included under this agreement, not limited to Appendix 4 and 6. **There is a Delta of drawings that is updated by SDS in parallel that contains SIE information, that are not listed in App 4 and 6.** Or then, and extra clause should be written to clarify what happens with any Design Deliverable not explicitly listed in this MoU.

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Comment [MBE10]: If Siemens would not directly pay to SDS (but we might accept a separate agreement to cross-compensate or incentivize BB for specific sub-targets of SDS Completion „sponsored“ by Siemens, subject to priorities decided by Siemens and to a diminishment of said incentivisation payments to BB if SDS is late), we suggest to participate in the Supervising Committee as regards tracking progress of inputs/outputs but we would not need any direct involvement as to specific SDS remuneration decisions.

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Comment [MW11]: Termination of MoU limited to monthly basis. Acceptable?

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~~20.19. For the avoidance of doubt, the intention of the current MoU purpose of this Agreement is solely to provide to BBUK a higher certitude on an SDS design delivery programme of Appendix 4 allow BBUK to mitigate its loss in respect of the late delivery of the design, by means of an extra incentivisation payment to the SDS Provider as per Appendix 5 intended to compensate SDS for an additional amount of design coordination resources. The current MoU This is without prejudice to either Parties rights or obligations under the SDS Agreement or SDS Novation Agreement does not constitute any recognition, acceptance from by either of the Parties, as to why the SDS design delivery programme is delayed thus far, nor does it constitute any extension of time to the SDS Provider vis a vis the original conditions of the under the SDS Agreement as novated to Infraco. Nothing in this MoU Agreement relieves the SDS Provider from any of its fulfilling its obligations under the SDS Agreement and SDS Novation Agreement & (original) SDS Agreement, nor diminishes effects the rights or remedies nor the recourses of Infraco against the SDS Provider under suchsaid Agreements.~~

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Comment [MW12]: The SDS Novation Agreement does not cover all obligations of the SDS Agreement. - ite

~~20 This Agreement shall be governed and construed in accordance with Scots Law and the Parties hereby irrevocably submit to the exclusive jurisdiction of the Court of Session in relation to this Agreement.~~

~~IN WITNESS WHEREOF the Parties have entered into this Memorandum of understanding Agreement on the date first written above.~~

Executed for and on behalf of
Bilfinger Berger UK Limited

Authorised Signatory

Full Name

Witness Signature

Full Name

Executed for and on behalf of
Siemens PLC
Authorised Signatory

Full Name

Witness Signature

Full Name

Executed for and on behalf of
Parsons Brinckerhoff Limited

Authorised Signatory

Full Name

Witness Signature

Full Name
