

SDS NOVATION AGREEMENT TERMS

PROPOSAL 21/2/08

1.0 Introduction

- 1.1 Consistent with the ETN Procurement Strategy and Business Case it is proposed to novate the SDS Contract to Infraco concurrent with the award of the Infraco Contract.
- 1.2 A novation agreement containing core novation terms are included in Schedule 8 to the SDS Contract. However, there are a number of matters that need to be dealt with to bring about an arrangement which is aligned to the requirements of each party – tie, SDS and BBS. Key to the success of the novation is the alignment of ERs, Infraco Proposals and SDS Design.

2.0 Alignment of Infraco Proposals and SDS Design

- 2.1 A 'blanket warranty' by SDS of that their design is consistent with the Infraco Proposals is not appropriate as it ignores the role of Infraco in working with SDS to bring about alignment.
- 2.2 **tie** cannot and will not take the technical interface risk between Infraco Proposals and SDS design as to do so runs contrary to the principles of the novation.
- 2.3 **tie** and SDS agree that the key to resolving the novation is to bring about alignment of the SDS design and Infraco Proposals. There are three aspects to this:-
- A Civils – mismatches between the SDS design and the Infraco Proposals
 - B Systems – mismatches between the performance specs or procurement specs and Infraco Proposals
 - C Interfaces - conflicts or gaps between BBS Infraco Proposals for systems and the civils work to which this relates
- 2.4 The resolution of these are as follows:-
- A Civils – BBS have not provided their civils Infraco Proposals. This is expected to say that they will build in accordance with the SDS design. Assuming this to be the case and to the extent that it is then a warranty from SDS for this aspect is irrelevant. The alignment of SDS design for roads and BBS's approach are to be reconciled.
 - B Systems – The mismatches need to be identified, some of this may well already be picked up in the review of ERs as such specs are probably already in the ERs, and probably is less constrained form. The work to bring about alignment here should not be extensive.
 - C Interfaces – This is where there is more extensive work required. SDS have not designed their civils and building works with any particular proprietary products or systems in mind. Also they have not done the detailing of interfaces. The interfaces, any mismatches or gaps need to be identified to

together with the work needed to close them and a programme for closing them. Tie need SDS to work with tie to quickly develop a process and plan to achieve this. this will then be agreed between SDS, tie and BBS. It is envisaged that this could be to agree a programme and adjustment mechanism for the identification and resolution of the mismatches and include that into the novation agreement, accepting that much of that will drift into the post award period.

2.5 It is not in tie's gift to bring about a resolution on this without the active participation and support of both SDS and BBS as the detail of the respective parties designs and proposals are best known and understood by them. Both SDS and BBS need to work with us to identify the detail to enable tie to instruct either:-

- A change to the SDS design, or further SDS design work
- A change to the ERs
- A change to the Infraco Proposals
- Or some combination of the three.

2.6 The mismatch in OLE systems needs to be resolved, at least in principle before any novation and with CEC's agreement to the solution. SDS's support will be required to bring this about.

3.0 Employer's Requirements

3.1 tie need to issue instructions on any misalignments and then we need BBS to warrant that their design does and will conform to the Employer's Requirements as a minimum to the extent that of their design obligations under the scope split. The scope split between BBS and SDS needs to be resolved first.

4.0 Commercial Aspects

4.1 tie accept that, to the extent that it is not one of SDS's obligations under the contract, that changes to the SDS designs completed to date that are required to bring about alignment are instructed by tie (pre novation) and BBS (post novation) and that SDS are paid in accordance with the contract. Management time to provide such support and assistance as tie may require in order to develop plans and processes for dealing with this and reviewing the Infraco Proposals are part of the Services required by the SDS contract. To enable the objective of delivering a novation to tie's programme to be achieved tie requests flexibility from SDS on the response times set out in the contract.

4.2 Warranties – tie requires SDS to provide the warranties as set out in the novation plan and as reconfirmed by the note produced after the teleconference with SDS on 5/2/08. It is accepted that the warranties are not as stark as set out in the current terms in respect of Employer's Requirements and Infraco Proposals. In the case of Employer's Requirements the warranty provided by SDS could be along the lines of "for the designs which SDS is obliged to provide under its contract and as modified by the 'scope split agreement' SDS warrant that they meet the Employer's Requirements subject to the resolution of the identified divergences as set out in Appendix ??". The ERs are also to be appended to the Novation Agreement.

- 4.3 The remaining warranties that relate to the status of the SDS designs and supporting consents etc should be unqualified.
- 4.4 Obligations to obtain consents aligned to those in the Infraco Contract – see proposed Infraco Contract Clause 19 as previously passed to SDS. This effectively provides for relief where consents are not forthcoming where SDS have provided the required information within the timescales agreed with the consenting authority. SDS agreed in principle. Final draft to be sent to SDS (latest draft will be sent today).
- 4.5 A programme for delivery of the remaining designs is agreed between tie, SDS and BBS which aligns with the programme for delivery of the construction works. This programme will include a programme for delivery of the CEC Prior Approvals and Technical Consents as agreed between tie, CEC, SDS and BBS. This programme will be included as a schedule to the Novation Agreement and the Programme section of the Infraco Contract. This programme will become the SDS programme. SDS agreed in principle. SDS wish to see how this fits into the BBS construction programme (to be satisfied that there are no disconnects).
- 4.6 SDS 'stand behind' the programme for delivery of the remaining designs and are liable to Infraco for the consequences of any failure to do so, subject to the reliefs and terms in the SDS contract and Novation agreement terms i.e. SDS to propose LDs level and cap for this aspect of their delivery (this is required by cob 25/2/08 at the latest). LDs level and cap to be meaningful such that SDS suffer significant loss should they fail. SDS confirmed that they stand behind the contract requirement to provide designs to standard i.e. to fulfil the reasonable skill and care obligation (as distinct from the obligation to deliver remaining designs to programme).
- 4.7 SDS provides the warranties and confirmations as described in the Disclosure Statement section of the SDS Novation Plan.
- 4.8 SDS currently have a problem with Novation Agreement clause 15.15. This issue will be resolved if alignment of Infraco ERs with SDS design is brought about.
- 4.9 Incentivisation arrangement – To be considered by tie.
- 4.10 Milestone payments due under the SDS Contract are included as discrete milestones in the Infraco Contract milestone payment schedule. Payments will be made to Infraco on satisfaction of the criteria contained within the SDS Contract. The timescales for payment will be aligned so that those in the SDS Contract are not extended. SDS agreed in principle.
- 4.11 All amendments to the SDS contract to establish a sub contract between SDS and Infraco will be contained in the SDS Novation Agreement. The only other document will be any purchase order necessary to enable payment of SDS by BBS. This must be signed concurrent with the Infraco award and SDS novation and will contain only payment process details and a cross reference to the Novation Agreement. Pro forma to be passed to SDS. BBS to provide.

- 4.12 SDS undertake to support BBS in providing information to support compensation events claims. SDS agreed in principle. SDS to review proposed terms in the Novation Agreement (provided 24/2/08).
- 4.13 tie and BBS require a PCG from SDS US Parent in the form advised 24/2/08. This is being reviewed by PB UK Board.
- 4.14 SDS deliver their designs in accordance with the BBS quality management system and design management procedures. SDS to review BBS proposed QMS. Agreed to substitute tie Design Management Process for current contract review process (Steve Reynolds to confirm).
- 4.15 Halcrow provide a collateral warranty to both tie and Infraco. Tie to provide a copy of the EARL CW to SDS. SDS to provide Halcrow proposal to tie.
- 4.16 Office space for the SDS provider. Working space and all office facilities to be provided free of charge to the SDS provider for the staff currently located in tie's offices.
- 4.17 Construction Support. SDS are currently preparing an organisation chart with CV's and day rates. We anticipate being able to provide this on or before 29 February.
- 4.18 All payment issues are to be resolved prior to novation. This is subject to all requisite information being provided to tie.
- 4.19 Collateral Warranties to NR and BAA. SDS position is that this is not a requirement of the SDS contract. Clause 29.11 of appendix 1 of the Novation agreement should therefore be removed. In addition there is no need for clause 29.10 as clause 29.6 already requires the SDS to provide a warranty to tie. SDS will provide this warranty to tie at novation.
- 4.20 SDS to review and comment on the Novation terms provided on 24/2/08 by cob 25/2/08

Further points on SDS EMail

- Any further design development that may required to align the design with the Infraco's installation works to be instructed as a Change Order to the SDS Agreement in accordance with terms of the SDS contract. – No this is far too loose
- Please can you provide the latest draft Infraco contract. (current issue we have is 12 February), including schedules 7, 10, 24, 33, and 2. – Yes tie will provide next Wednesday
- Change of Law. We believe that the terms of the SDS agreement are sufficient – AF to advise