

**CERTIFIER AGREEMENT**

**among**

**tie LIMITED**

**and**

**CITY OF EDINBURGH COUNCIL**

**and**

**BILFINGER BERGER CIVIL UK LIMITED**

**and**

**SIEMENS plc**

**and**

**HG CONSULTING (SCOTLAND) LIMITED**

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**Certifier's Agreement relating to the Infraco Works under the Infraco Contract**

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**THIS APPOINTMENT** is made

**AMONG:**

- (1) **tie LIMITED** (company number SC230949), whose registered office is at City Chambers, High Street, Edinburgh, Midlothian, EH1 1YJ ("**tie**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
  - (2) **CITY OF EDINBURGH COUNCIL**, the Local Authority for the said City under the Local Government etc. (Scotland) Act 1994 and having its principal office at City Chambers, High Street, Edinburgh, EH1 1YJ ("**CEC**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
  - (3) **BILFINGER BERGER CIVIL UK LIMITED**, a company incorporated in England and Wales under number 02418086 and having its registered office at 3<sup>rd</sup> Floor Braywick Gate, Braywick Road, Maidenhead, Berkshire SL6 1DA ("**BBUK**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
  - (4) **SIEMENS plc**, a company incorporated in England and Wales under number 00727817 and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley, Surrey, GU16 8QD ("**Siemens**") which expression shall include its personal representatives, successors, permitted assignees and transferees;
- (3) and (4) the "**Infraco**"; and
- (5) **HG CONSULTING (SCOTLAND) LIMITED** (company number SC204303), whose registered office is at 292 St Vincent Street, Glasgow G2 5TQ ("**Certifier**") which expression shall include its personal representatives, successors, permitted assignees and transferees.

**BACKGROUND**

- (A) tie and Infraco are Parties to an Agreement under which Infraco is appointed to carry out and manage the Infraco Works (such Agreement, is herein after referred to as the "**Infraco Contract**"); and  
and
- (B) tie, CEC, BBUK and Siemens wish to appoint the Certifier to carry out the duties and obligations of the Certifier described in the Infraco Contact in accordance with this Appointment.

# 1 DEFINITIONS AND INTERPRETATION

## 1.1 Definitions

1.1.1 In this Appointment unless the context requires otherwise:

"**Business Day**" means a day, other than a Saturday or a Sunday, on which clearing banks are open for commercial business in Edinburgh;

"**Fee**" means, in respect of the relevant calendar month, the sum calculated in accordance with Schedule Part 2;

"**Invoice**" means the invoice and associated supporting information referred to in Clause 6 (*Fee*);

"**Services**" means the services to be performed by the Certifier including those services set out in Clause 5 and Schedule Part 1; and

"**VAT**" means value added tax as provided for in the Value Added Tax Act 1994 at the rate in force at the due date for payment of any sum under this Appointment.

1.1.2 Unless otherwise defined in this Appointment or the context requires otherwise, words and phrases defined (expressly or by reference) in the Infraco Contract have the same meaning in this Appointment.

## 1.2 Interpretation and Construction

1.2.1 In this Appointment, unless otherwise specified or the context otherwise requires:

- (a) words in the singular include the plural and *vice versa*;
- (b) words in one gender include all other genders;
- (c) words referring to the whole are treated as including reference to any part of the whole;
- (d) references to a Clause or Schedule are to the relevant clause or schedule of this Appointment;
- (e) reference to a paragraph is to a paragraph in the Background or Schedule;
- (f) reference to this Appointment or to any other document is a reference to this Appointment or to that other document as modified, amended, varied, supplemented, assigned, novated or replaced (in each case, other than in breach of the provisions of this Appointment) at any time;
- (g) reference to a statute or statutory provision is a reference to it as it is in force from time to time and includes:
  - (i) any statute, statutory provision or subordinate legislation which it amends or re-enacts; and

- (ii) any subordinate legislation made from time to time under that statute or statutory provision; and
  - (h) reference to any Scottish legal term for any action, remedy, method of judicial proceeding, legal document, legal status, court, official or any legal concept, state of affairs or thing is deemed, in respect of any jurisdiction other than Scotland, to include that which most approximates in that jurisdiction to the Scottish legal term.
- 1.2.2 Clause, Schedule and paragraph headings do not affect the interpretation of this Appointment.
- 1.2.3 Words and phrases defined in any part of this Appointment bear the same meanings throughout this Appointment.
- 1.2.4 The Schedules form part of this Appointment.
- 1.2.5 Any action required to be performed by a party to this Appointment which falls to be performed on a day which is not a Business Day is to be performed on the next Business Day.

## **2 APPOINTMENT**

CEC appoints the Certifier and the Certifier agrees to carry out the Services in accordance with the terms and conditions of this Appointment. The terms of this Appointment shall apply to the Services, whether such services are performed before or after the date of this Appointment. The appointment of the Certifier shall be deemed to have commenced on the earlier of the date of this Appointment and the time when the Certifier first performed the Services.

## **3 DUTY OF CARE**

### **3.1 Duty of Care (warranty)**

The Certifier warrants to each of CEC, tie, BBUK and Siemens that, in carrying out the Services, it has exercised and will continue to exercise all the reasonable skill, care and diligence to be expected of a prudent, experienced, properly qualified and competent professional of the relevant discipline with experience of carrying out services of a similar scope, type, scale and complexity to the Services and in accordance with all current British Standards and Codes of Practice and any other approved criteria and standards or code and in compliance with all applicable statutes and regulations in relation to projects of a similar size, scope and complexity to the Infracore Works

### **3.2 Duty of Care (reliance)**

- 3.2.1 The Certifier acknowledges that each of tie, CEC, BBUK and Siemens have relied and will continue to rely upon the reasonable skill, care and diligence of the Certifier in the performance of the Services and that it owes a duty of care to each of CEC, tie, BBUK and Siemens under this Appointment.

- 3.2.2 The Certifier warrants that the liability of the Certifier to each of CEC, tie, BBUK and Siemens for any breach of the terms of this Appointment shall not be affected or diminished where each of CEC, tie, BBUK and Siemens has suffered no loss, or a loss different from each of CEC, tie, BBUK and Siemens, by reason of such breach. The Certifier undertakes to each of CEC, tie, BBUK and Siemens not to contend that its liability to each of CEC, tie, BBUK and Siemens is so affected or diminished, whether in defence of proceedings under this Appointment or otherwise; and
- 3.2.3 The Certifier further undertakes to each of tie, BBUK and Siemens that it will not use any claim of set off in defence of any claim raised by each of tie, BBUK and Siemens under this Appointment.

**3.3 Duty of Care (impartiality)**

The Certifier shall carry out the Services (including without limitation the exercise of any discretion in the performance of the Services) independently, fairly and impartially to and as between each of tie, CEC, BBUK and Siemens. Whilst the Certifier may take into account any representations made by any of tie, CEC, BBUK or Siemens the Certifier shall not be bound to comply with any representations made by any of them in connection with any matter in which the Certifier is required to exercise its professional judgement.

**4 CERTIFIER'S DUTIES**

**4.1 Carrying out the Services**

- 4.1.1 The Certifier shall promptly and efficiently perform the Services consistent with the standards specified in clauses 3.1, 3.2 and 3.3 and as set out in the Infraco Contract.
- 4.1.2 The Certifier shall familiarise itself with and shall be deemed to have full knowledge of the provisions of the Infraco Contract and shall be deemed to have taken full account of all the undertakings and warranties, both expressed and implied, on the part of, tie, Infraco, BBUK or Siemens which are set out in the Infraco Contract. The Certifier shall perform the Services in such a manner and at such times that no act, omission or default of the Certifier shall constitute or cause any breach by, tie, Infraco, BBUK or Siemens of any requirements and/or obligations in the Infraco Contract.
- 4.1.3 The Certifier shall comply with all reasonable instructions given to it by CEC (giving due regard to any comments made by tie and/or Infraco) except to the extent that the Certifier reasonably considers that any such instructions vary or might vary the Services or its authority or responsibilities under this Appointment or prejudice or might prejudice the exercise by the Certifier of its professional judgement in accordance with clauses 3.1, 3.2 and 3.3. All instructions to the Certifier shall be given by CEC and CEC shall provide a copy of any instruction issued to the Certifier to the other parties immediately following issue.

## 5 VALUATION

### 5.1 Applications for Payment

5.1.1 Infraco shall provide to the Certifier and tie's Representative a copy of its Application for Payment with all attendant information in respect of the relevant Valuation Date not later than 7 days before the Valuation Date. Such information is to be issued electronically and in hard copy formats.

### 5.2 Valuation meeting

Infraco and tie shall invite the Certifier to attend, and the Certifier shall attend, a meeting between those parties on the Valuation Date to consider the relevant Application for Payment and the Certifier shall be afforded all opportunity to observe, take notes and also to inspect the Infraco Works.

### 5.3 Valuation Certificate

Following any meeting held pursuant to Clause 5.2 the Certifier shall issue a Valuation Certificate and/or a tie Change Order (where an On Street Works Estimate has been considered and determined by the Certifier) in accordance with paragraph 2.2 of Schedule Part 1.

## 6 FEE

### 6.1 Obligation

CEC shall pay the Fee to the Certifier subject to the due performance by the Certifier of its obligations under this Appointment. For the avoidance of doubt, Infraco shall be under no obligation to make payments to the Certifier.

### 6.2 Invoices

The Certifier must submit an Invoice to CEC for amounts due in respect of the preceding calendar month on the first Business Day of each calendar month. The Invoice must state the basis on which the amount due is calculated and any applicable VAT, and be supplemented by such other information as may be necessary to allow CEC to verify the Invoice to its satisfaction.

### 6.3 When payment is due

Payment becomes due to the Certifier on the date of receipt of the Invoice.

### 6.4 Final date for payment

The final date for payment by CEC is 30 days after the due date.

### 6.5 Notice regarding amount proposing to pay

Not later than five days after the date of receipt of the Invoice, CEC may give written notice to the Certifier stating the amount which CEC proposes to pay and the

basis on which that amount is calculated. Where no such notice is given, the amount to be paid is that stated in the Invoice.

#### **6.6 Withholding/deducting payment**

If CEC intends to withhold payment of and/or deduct any amount in the Invoice which is otherwise due in terms of Clause 6.3 (*When payment is due*), written notice must be given to the Certifier not later than five days before the final date for payment pursuant to Clause 6.4 (*Final date for payment*). The notice must state:

- (a) the amount to be withheld;
- (b) the grounds for withholding and/or deducting payment; and
- (c) the amount of withholding and/or deduction attributable to each ground.

#### **6.7 Interest on late payment**

If CEC fails to pay any amount due to the Certifier by the final date for payment of that amount, CEC must pay simple interest on the amount due and unpaid as from the final date for payment to the date of payment at the rate of 2% per annum above the base rate from time to time of the Bank of England.

#### **6.8 Preliminaries information**

Where requested to do so by the Certifier pursuant to paragraph 5.3 of Schedule Part 1, Infraco shall forthwith provide to the Certifier the information referred to in that paragraph.

### **7 ASSIGNATION**

#### **7.1 Assignment by the Certifier**

The Certifier must not assign any rights or obligations under this Appointment without the prior written consent of CEC and Infraco.

#### **7.2 Assignment by CEC**

CEC may at any time assign any rights and/or obligations under this Appointment.

#### **7.3 Assignment by tie**

tie may at any time assign any rights and/or obligations under this Appointment to any party to whom its interest in the Infraco Contract is novated, assigned or otherwise transferred in accordance with Clause 98 of the Infraco Contract.

#### **7.4 Certifier's undertaking**

The Certifier may not at any time assert that any permitted assignee in terms of this Appointment is precluded from recovering any loss resulting from any breach of this Appointment because such assignee is not an original party to this Appointment.



## 8 INSURANCE

### 8.1 Professional indemnity insurance

The Certifier confirms that it maintains and will continue and maintain professional indemnity insurance with reputable insurers with a limit of indemnity of not less than ten million pounds (£10,000,000) sterling for any one claim.

### 8.2 Maintenance of insurance

#### 8.2.1 The Certifier must:

- (a) maintain such insurance for the period commencing on the date on which the Certifier starts providing the Services and expiring on the date occurring six years after the date of completion of the Infraco Works or termination or expiry of the Infraco Contract, if earlier provided that such insurance is generally available to members of the Certifier's profession in the market at commercially reasonable rates and on commercially reasonable terms;
- (b) comply with all conditions and obligations of such insurance policy; and
- (c) immediately inform CEC and Infraco if such insurance ceases to be available at commercially reasonable rates or on commercially reasonable terms. CEC, Infraco and the Certifier must then discuss the best means of protecting CEC's, tie's and Infraco's respective positions and the Certifier must, if requested by CEC and/or Infraco, take out such insurance above commercially reasonable rates if CEC and/or Infraco (as the case may be) undertakes in writing to reimburse the Certifier in respect of the net cost of such insurance above commercially reasonable rates or again at CEC and Infraco's option the Certifier shall take out in any relevant period such reduced cover (if any) as is available and as would be fair and reasonable in the circumstances for the Certifier to obtain.

8.2.2 If the Certifier fails to maintain professional indemnity insurance in accordance with this Clause 8 (*Insurance*) and fails to remedy such default within 14 days of a written request from CEC and/or Infraco then in addition to any other right CEC and Infraco may have CEC and/or Infraco may procure such insurance cover as may be available to provide alternative equivalent protection and to recover as a debt the cost of maintaining such insurance from the Certifier.

8.2.3 The Certifier confirms that (where required by its insurance policy) it has notified its insurers of this Appointment and its contents (and where relevant supplied copies to its insurers including all schedules appendices and other documents ancillary hereto) and confirms that there are no terms or conditions of this Appointment or such other ancillary documents that would invalidate or otherwise prejudice the terms of the Certifier's professional indemnity insurance cover.

### 8.3 **Evidence of insurance**

As and when reasonably requested by CEC or Infraco, the Certifier must produce for inspection documentary evidence in the form of a broker's letter or equivalent confirming that such professional indemnity insurance is being properly maintained.

### 8.4 **Insurance costs**

Without prejudice to Clause 8.2, from the date of this Appointment CEC shall be responsible for the annual costs of the Certifier maintaining professional indemnity insurance in accordance with Clause 8.1 to the extent that such costs are greater than the costs the Certifier would otherwise incur in maintaining professional indemnity insurance of £2 million for each and every claim on substantially the same terms in respect of the relevant insurance year (provided that CEC shall not be responsible for any increased insurance costs to the extent that such increase is a result of the Certifier's claims history) ("**Increased Insurance Costs**"). In respect of each insurance year (and until the date of expiry of Certifier's obligation to maintain insurance in accordance with Clause 8.2.1(a)), CEC shall pay to the Certifier the Increased Insurance Costs within 30 days of written request to the extent that the Certifier has not already recovered such Increased Insurance Costs from CEC under any other agreement with CEC, provided that the Certifier has provided such information as may be necessary to allow CEC to verify such request to its reasonable satisfaction.

### 8.5 **Legal fees**

CEC shall be responsible for the Certifier's reasonable and properly incurred legal fees in respect of the negotiation of and entering into this Appointment. CEC shall pay to the Certifier such legal fees within 30 days of written request, provided that the Certifier has provided such information as may be necessary to allow CEC to verify such request to its reasonable satisfaction.

## 9 **PERSONNEL**

The Certifier undertakes that Colin Smith shall be engaged in the provision of the Services, unless CEC agrees otherwise in writing.

## 10 **SUSPENSION AND TERMINATION**

### 10.1 **Suspension by CEC**

10.1.1 Subject to Clause 10.1.2, CEC may suspend the performance of any or all of the Services on the expiry of 14 days' notice given in writing to the Certifier.

10.1.2 CEC shall not suspend the performance of the Services without obtaining Infraco's prior written consent to such suspension (such consent not to be unreasonably withheld or delayed).

### 10.2 **Suspension by the Certifier**

If CEC is in default over payments of amounts properly due in respect of the Fee, and no notice of intention to withhold such amounts has been given under Clause 6.6

*(Withholding/deducting payment)* the Certifier may suspend performance of any or all of the Services. This right is subject to the Certifier first giving tie, CEC and Infraco not less than 28 days' notice in writing of such intention and stating the grounds for suspension. The right to suspend performance shall cease when either: (i) CEC; or (ii) Infraco pursuant to Clause 10.2A, makes payment of the amount due.

**10.2A Payment by Infraco**

The Certifier's right to suspend performance under Clause 10.2 (*Suspension by the Certifier*) shall cease if, within the period of twenty eight (28) days referred to in Clause 10.2 (*Suspension by the Certifier*) Infraco pays to the Certifier any sums which have become due under this Appointment but which remain unpaid and have given rise to the service of the notice referred to in Clause 10.2 (*Suspension by the Certifier*).

Where Infraco makes any payment pursuant to this Clause 10.2A (*Payment by Infraco*), CEC shall reimburse Infraco for any such payment within ten (10) Business Days of the payment having been made.

For the avoidance of doubt, the making of any payment by Infraco pursuant to this Clause 10.2A (*Payment by Infraco*) shall not give rise to any liability on the part of Infraco to make any future payments to the Certifier.

**10.3 Payment to Certifier for Services prior to and during suspension**

On suspension of this Appointment, the Certifier is entitled to payment in respect of the Services rendered in accordance with this Appointment up to the time of suspension. On resumption of performance of the Services any such payments will be regarded as payments on account towards the Fee. During any period of suspension the Certifier is entitled to be reimbursed for all proper and reasonable expenses necessarily incurred and first approved by CEC (such approval not to be unreasonably withheld).

**10.4 No compensation for suspension of Services**

The Certifier is not entitled to any compensation from CEC, tie and/or Infraco for any loss of profit, loss of contracts or any other losses and/or expenses arising out of or in connection with any suspension of the Services under this Appointment.

**10.5 Termination following suspension**

Subject to Clause 10.9, when the Services, or any part of them, are suspended for 6 months or more tie, Infraco or the Certifier may make a written request for the Services to be resumed and if no such instruction to resume is given within 14 days after such request, the Party making the request may terminate this Appointment by serving written notice on the other to that effect.

**10.6 Termination by CEC**

**10.6.1** Subject to Clause 10.9, CEC may terminate the appointment of the Certifier under this Appointment:

- (a) at any time on not less than 14 days' notice in writing;
- (b) immediately if the Certifier becomes insolvent; or
- (c) if the Certifier is in material or persistent breach of its obligations and fails to remedy this within 14 days of receiving a notice from CEC specifying the breach and requiring its remedy.

10.6.2 For the purposes of Clause 10.6.1 (*Termination by CEC*) and Clause 10.9 (*Appointment of replacement Certifier*), a party is insolvent if:

- (a) any corporate action, legal proceedings or other proposal, procedure or step is taken in relation to:
  - (i) the appointment of a liquidator, receiver, administrator, administrative receiver, compulsory manager or other similar officer in respect of the Certifier or any of its assets; or
  - (ii) any voluntary arrangement, scheme of arrangement or re-organisation of the Certifier; or
  - (iii) any analogous procedure or step is taken in any jurisdiction;
- (b) if the Certifier is an individual, the individual is made bankrupt, is the subject of a voluntary arrangement or applies for a debt relief order or any of the events or circumstances outlined in paragraphs 10.6.2 (d) to 10.6.2 (f) occurs in relation to it or any analogous procedure, step, event or circumstance is taken or occurs in relation to it in any jurisdiction;
- (c) if the Certifier is a partnership any partner is made bankrupt, is the subject of a voluntary arrangement or applies for a debt relief order or any of the events or circumstances outlined in paragraphs 10.6.2 (d) to 10.6.2 (f) occurs in relation to it or any analogous procedure, step, event or circumstance is taken or occurs in relation to it in any jurisdiction;
- (d) the Certifier is unable or admits inability to pay its debts as they fall due, suspends making payments on any of its debts, proposes any composition, assignment or arrangement or, by reason of actual or anticipated financial difficulties, commences negotiations with, one or more of its creditors with a view to re-scheduling any of its indebtedness or any analogous procedure, step, event or circumstance is taken or occurs in relation to it in any jurisdiction;
- (e) the value of the Certifier's assets at any time is less than its liabilities (taking into account contingent and prospective liabilities);
- (f) a moratorium is declared or comes into force in respect of the Certifier or any of its indebtedness.

**10.7 Payment to Certifier following termination**

If this Appointment is terminated by CEC (other than termination for a breach of any of the terms of this Appointment by the Certifier, unless such breach is pursuant to Clause 9) the Certifier is entitled to be paid its reasonable and proper fees for the Services provided prior to the date of such termination. No other fees, costs, losses or expenses whatsoever are payable.

**10.8 Termination not to prejudice pre existing rights and remedies**

Termination of this Appointment is without prejudice to the rights and remedies of either party in relation to any negligence, omission, default or breach of contract of the other prior to such termination.

**10.9 Appointment of replacement Certifier**

In no circumstances (other than the Certifier becoming insolvent) shall CEC, tie or Infraco terminate this Appointment until a replacement has been agreed by CEC, tie and Infraco (acting reasonably) and appointed.

**11 CONFIDENTIALITY**

**11.1 Obligation of confidentiality**

The Certifier shall treat as secret and confidential and shall not at any time for any reason disclose or permit to be disclosed to any person or otherwise make use of any unpublished information relating to this Appointment, tie, CEC, BBUK and/or Siemens or know-how business plans or finances or any such information relating to a subsidiary, supplier, customer or client of tie, CEC, BBUK and/or Siemens where the information was received during the period of this Appointment. Upon termination of this Appointment for whatever reason the Certifier shall deliver to CEC all working papers, computer disks and tapes or other materials and copies provided to or prepared by the Certifier pursuant to this Appointment or to any previous obligations owed to CEC, tie, BBUK and/or Siemens.

**11.2 Exception**

The provisions of Clause 11.1 shall not apply to:

- (a) any disclosure pursuant to a statutory or legal obligation placed upon the Certifier, including any requirements for disclosure under FOISA, the Code, or the Environmental Information Regulations; and
- (b) any information which is required to be disclosed to the Certifier's insurers, financial advisers and/or legal advisers, provided such party is subject to an obligation of confidentiality in substantially similar terms to Clause 11.1.

**12 WAIVERS AND REMEDIES CUMULATIVE**

The rights and remedies provided in this Appointment for the benefit of or in favour of any party are cumulative and do not exclude any other right or remedy provided at law unless expressly stated otherwise. No failure or neglect on the part of either

party to exercise such rights or remedies and no single or partial exercise of them precludes any further or other exercise of such rights and remedies.

13 **NOTICES**

13.1 **Writing**

Any notice, consent or approval to be given under or in connection with the matters contemplated by this Appointment is to be in writing and signed by or on behalf of the party giving it.

13.2 **Service**

Any notice or communication referred to in Clause 13.1 (*Writing*) is to be served by delivering it personally or sending it by pre-paid recorded delivery or registered post (or registered airmail in the case of an address for service outside the United Kingdom) or by fax to the address and for the attention of the relevant party set out in Clause 13.4 (*Addresses for notices*) (or as otherwise notified by that party under Clause 13.4).

13.3 **Deemed receipt**

Any notice or other communication referred to in Clause 13.1 (*Writing*) is deemed to have been received:

- (a) if delivered personally, at the time of delivery;
- (b) in the case of pre-paid recorded delivery or registered post, 48 hours from the date of posting;
- (c) in the case of registered airmail, five days from the date of posting; and
- (d) in the case of fax, at the time of transmission;

provided that if deemed receipt occurs after 5pm on a Business Day, or on a day which is not a Business Day, the notice shall be deemed to have been received at 9am on the next Business Day.

13.4 **Addresses for notices**

The addresses and fax numbers of the Parties for the purposes of Clause 13 (*Notices*) are:

CEC:

Address: Waverley Court, 4 East Market Street Edinburgh EH8 8BG

For the attention of: Director of City Development

Fax number: 0131 [REDACTED]

tie:

Address: Citypoint, 65 Haymarket Terrace, Edinburgh EH12 5HD

For the attention of: Tram Project Director

Fax number: 0131 [REDACTED]

BBUK:

Address: 9 Lochside Avenue, Edinburgh EH12 9DJ

For the attention of: Martin Foerder

Fax number: 0131 [REDACTED]

Siemens:

Address: 9 Lochside Avenue, Edinburgh EH12 9DJ

For the attention of: Alfred Brandenburger

Fax number: 0131 [REDACTED]

Certifier:

Address: 20 Lynedoch Crescent, Glasgow G3 6EQ

For the attention of: Colin Smith

Fax number: 0141 [REDACTED]

or such other address or fax number in the United Kingdom as may be notified in writing from time to time by the relevant party to the other party.

14 **NOTIFICATION OF LIABILITY, CLAIMS AND DISPUTES**

If the Certifier receives any correspondence from any party concerning any legal liability, claim, dispute or any significant difficulty arising in connection with this Appointment, it must promptly forward a copy to CEC and Infracore unless such documents are legally privileged documents for the benefit of the Certifier (including without limitation any correspondence, documents or memoranda involving any claim or contemplated claim, proceedings or contemplated proceedings involving the Certifier which are privileged).

15 **LIMIT ON LIABILITY**

Notwithstanding any other provision of this Appointment, the maximum liability of the Certifier pursuant to and arising out of this Appointment shall not exceed ten million pounds sterling (£10,000,000) any one claim.

16 **ENTIRE AGREEMENT**

This Appointment sets out the entire agreement and understanding of the parties and supersedes all prior oral and written agreements, understandings or arrangements relating to the subject matter of this Appointment. None of the parties shall be entitled to rely on anything which is not stated in this Appointment or which cannot be implied as being reasonably required to give it business efficacy and it not otherwise inconsistent herewith.

17 **SEVERANCE**

If any provision of this Appointment is or becomes illegal, invalid or unenforceable in any jurisdiction that will not affect:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this Appointment; or
- (b) the legality, validity or enforceability in any other jurisdiction of that or any other provision of this Appointment.

18 **GOVERNING LAW AND JURISDICTION**

Clause 117 (*Applicable Law*) of the Infraco Contract applies.

**IN WITNESS WHEREOF** these presents consisting of this and the preceding thirteen (13) pages and the Schedule annexed hereto are executed by the parties as follows:

SUBSCRIBED for and on behalf of  
HG CONSULTING (SCOTLAND) LIMITED

at *Edinburgh*  
on the *15<sup>th</sup>* day  
of *September*, 2011  
by

[Redacted Signature]

..... Director

*COLIN SPICHA*

..... Full Name

before this witness

[Redacted Witness Signature]

..... Witness

*JONATHAN TURNER*

..... Full Name

[Redacted Witness Address]

..... Address



SUBSCRIBED for and on behalf of  
CITY OF EDINBURGH COUNCIL

at *Edinburgh*  
on the *15* day  
of *September* 2011  
by

[Redacted Signature]

Authorised Signatory

*SUE BRUCE*

Full Name

before this witness

[Redacted Signature]

Witness

*JONATHAN TURNER*

Full Name

[Redacted Address]

Address

SUBSCRIBED for and on behalf of  
TIE LIMITED

at *Edinburgh*  
on the *15* day  
of *September* 2011  
by

[Redacted Signature]

Director/Authorised Signatory

*DAVID ALEXANDER ANDERSON*

Full Name

before this witness

[Redacted Signature]

Witness

*JONATHAN TURNER*

Full Name

[Redacted Address]

Address

SUBSCRIBED for and on behalf of  
BILFINGER BERGER CIVIL UK LIMITED

at *Edinburgh*  
on the *15<sup>th</sup>* day  
of *September* 2011  
by [REDACTED]

Authorised Signatory

*MARTIN FORBES*  
Full Name

before this witness

[REDACTED]  
Witness

*JONATHAN TURNER*  
Full Name

[REDACTED]  
Address

SUBSCRIBED for and on behalf of  
SIEMENS plc

at *Edinburgh*  
on the *15<sup>th</sup>* day  
of *September* 2011  
by [REDACTED]

Authorised Signatory

[REDACTED]  
Full Name

before this witness

[REDACTED]  
Witness

*JONATHAN TURNER*  
Full Name

[REDACTED]  
Address

*Authorised  
Signatory*



SCHEDULES

SCHEDULE PART 1

The Services

GENERAL

1 General

- 1.1 The Certifier shall familiarise itself with the Infraco Contract and any changes issued from time to time, and any other relevant documentation or information referred to in the Infraco Contract to the extent necessary to fulfil its obligations within the terms of the Infraco Contract and this Appointment.
- 1.2 The Certifier shall perform the Services independently, fairly and impartially to and as between tie, CEC, BBUK and Siemens and shall take into account all reasonable circumstances.
- 1.3 To the extent necessary in order to be in a position to carry out the Services the Certifier shall:
- (a) request and using reasonable endeavours obtain from Infraco such additional information as it reasonably requires to perform and properly discharge its obligations under this Appointment;
  - (b) where necessary attend project meetings (both on and off Site);
  - (c) enter the Site (complying with Infraco's site rules at all times) and from time to time monitor the Infraco Works to view the general state and progress of the Infraco Works to review overall workmanship, samples of goods and materials used or about to be used in the Infraco Works and to ascertain generally that the terms of the Infraco Contract have been and are being complied with by Infraco. The frequency and timing of the Certifier's visits are dependent on the progress of construction on the Site. All visits are to be included within the fee. The Certifier shall agree a programme with Infraco for the inspection of key construction processes and the completed Infraco Works and Infraco shall give the Certifier advance notice of these works being carried out on each Site;
  - (d) conduct site inspections on an occasional basis to become satisfied that the Infraco Works are being undertaken in such a manner as is generally consistent with Good Industry Practice and in a manner likely to result in compliance with the Infraco Contract and promptly notify Infraco, tie and CEC of any likely non-compliance; and
  - (e) conduct visual inspection prior to completion to become satisfied that the Infraco Works have been undertaken in such a manner as is generally consistent with the Infraco Contract.

## INFRACO WORKS

### 2 Valuation

- 2.1 In the event that there is a variance of opinion between Infraco and tie in respect of any Application for Payment made by Infraco in respect of the Infraco Works and following any meeting referred to in Clause 5.2, the Certifier may query Infraco and/or tie's opinion and ask for full justification of any opinion of value and Infraco and/or tie shall provide such information or justification as the Certifier may reasonably request. The extent of inquiry shall be to the Certifier's satisfaction.
- 2.2 Subject to paragraphs 2.3 and 2.4, in accordance with paragraph 2.6 and clauses 41.1 and 67.3 of the Infraco Contract, on each Valuation Date (as set out in of Schedule Part 35 to the Infraco Contract), the Certifier shall certify the matters set out in Clause 41.1 of the Infraco Contract and shall not later than 7 days after the relevant Valuation Date issue a Valuation Certificate in respect of such works to CEC, tie and Infraco.
- 2.3 Except in the case of the On Street Works after the On Street Works Trigger Date, any Milestone valued at less than £100,000 shall not be certified by the Certifier until the Milestone is 100% complete.
- 2.4 The Certifier acknowledges that Preliminaries set out in Schedule Part 5 and Schedule Part 45 (On Street Works) to the Infraco Contract are time based payments which shall be certified by the Certifier once the relevant time period has elapsed without the need for the further valuation or substantiation. After the On Street Works Trigger Date the Infraco shall demonstrate as required by Appendix C Part 5 that in relation to Civil Engineering Works only relevant work or expenditure to which the Preliminaries relate has been incurred or carried out.
- 2.5 In accordance with clause 67.3 of the Infraco Contract:
- 2.5.1 a Valuation Certificate shall set out that part of the sum claimed in the Application for Payment which the Certifier has certified and give reasons why any part of the sum claimed has not been certified and the value of the sums involved no later than 7 days after the Valuation Date
- 2.5.2 if Infraco fails to achieve the prescribed Environmental or Health and Safety Key Performance Indicators as set out in Schedule Part 40 (Environmental and Health and Safety Key Performance Indicators) in any Reporting Period, the Certifier shall make a deduction of 1% (the "**EHS KPI Deduction**") from the value of the sums certified in the Valuation Certificate save where and to the extent that Infraco demonstrates to the Certifier's satisfaction that such failure to achieve the prescribed Environmental or Health and Safety Key Performance Indicators did not result from a deficiency in either the Construction Phase Health and Safety Plan or from a failure in its management, in accordance with Good Industry Practice, of health, safety, quality or environmental aspects of the Infraco Works; and

2.5.3 the Certifier shall release the EHS KPI Deduction as soon as Infraco has satisfied the Certifier that the Construction Phase Health and Safety Plan has been updated and that the cause or causes of the EHS KPI Deduction has or have been rectified.

### 3 Sectional Completion

3.1 In accordance with clause 44.1 of the Infraco Contract, the Certifier shall inspect the Infraco Works on the date or dates reasonably specified by Infraco in accordance with clause 44.1 of the Infraco Contract and shall attend any of the tests to be carried out.

3.2 In accordance with clause 44.2 of the Infraco Contract, the Certifier shall, within 7 Business Days of any inspection made pursuant to paragraph 3.1, notify Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the relevant System Acceptance Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before the Section will have been substantially completed, tested and commissioned in accordance with the Infraco Contract. The Certifier shall repeat the inspection of the Infraco Works as often as may be necessary to ensure that all outstanding matters in relation to the Section are attended to in accordance with clauses 44.1 and 44.2 of the Infraco Contract. The Parties acknowledge that, in accordance with clause 44.2 of the Infraco Contract, conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of Infraco.

3.3 In accordance with clauses 44.3, 44.5A and 44.6 of the Infraco Contract, when a Section has been substantially completed, tested and commissioned in accordance with the Infraco Contract, the Certifier shall issue a Certificate of Sectional Completion to that effect stating the date upon which the Section was substantially completed, tested and commissioned provided always that a Certificate of Sectional Completion shall not be issued:

3.3.1 in respect of Section B, unless a Certificate of Sectional Completion has already been issued in respect of Section A, except where the acting reasonably decides otherwise; and

3.3.2 in respect of Section C, unless a Certificate of Sectional Completion has already been issued in respect of both Section A and Section B; and

3.3.3 in respect of Section D, unless a Certificate of Sectional Completion has been already issued in respect of Section A, Section B and Section C.

3.4 Where authorised by the in accordance with clause 44.6 of the Infraco Contract, the Certifier shall issue a Certificate of Sectional Completion notwithstanding that minor items of work ("**Snagging**") and, in relation to the issue of a Certificate of Sectional Completion for Section D, Patent Defects remain to be completed.

### 4 Notification of Service Commencement

4.1 Following notification from Infraco in accordance with clause 45.1 of the Infraco Contract, the Certifier shall inspect the Infraco Works on the date or dates

reasonably specified by the Infraco in accordance with clause 45.1 of the Infraco Contract and shall attend any of the tests to be carried out.

- 4.2 In accordance with clause 45.2 of the Infraco Contract, within seven (7) Business Days of any inspection made pursuant to paragraph 4.1, the Certifier shall notify Infraco of any outstanding matters (including further evidence of achievement of substantial completion or commissioning and the repetition of any of the Systems Acceptance Tests which are required to be carried out and passed in accordance with the Employer's Requirements) which must be attended to before Section D will have been substantially completed, tested and commissioned in accordance with the Infraco Contract. The Certifier shall repeat the procedures in paragraph 4.1 and this paragraph 4.2 as often as may be necessary to ensure that all outstanding matters in relation to Section D are attended to. The Parties acknowledge that, in accordance with clause 45.2 of the Infraco Contract conduct of all tests, including repetitions, in accordance with the Employer's Requirements shall be at the cost and under the responsibility of Infraco.
- 4.3 In accordance with clauses 45.3 and 45.5 of the Infraco Contract, when Section D has been substantially completed, tested and commissioned in accordance with the Infraco Contract, the Certifier shall issue a Certificate of Service Commencement to that effect stating the date upon which Section D was substantially completed, tested and commissioned provided always that subject to paragraph 4.4 a Certificate of Service Commencement shall not be issued until the Certifier has issued to Infraco a Certificate of Sectional Completion in relation to each of Section A, Section B, Section C and Section D in accordance with the Infraco Contract.
- 4.4 In accordance with clause 45.5 of the Infraco Contract, the Certifier may at his absolute discretion issue a Certificate of Service Commencement notwithstanding that Snagging and Patent Defects remain to be completed.
- 4.5 In accordance with clause 46.4 of the Infraco Contract, when all Snagging has been completed, the Certifier shall issue to Infraco a Snagging Rectification Certificate stating the date on which Infraco shall have completed its obligations to carry out such Snagging.

## **5 On Street Works Variations**

- 5.1 In accordance with paragraph 7.1 of Appendix B of Schedule Part 45 to the Infraco Contract (Pricing), Infraco, tie and the Certifier shall seek to agree any On Street Works Estimate as soon as reasonably practicable and in any event within 5 weeks of submission of the Estimate. In the event of any failure to agree, the Certifier shall make a determination and this shall be included in a Valuation Certificate (in respect of additional cost) and a tie Change Order (in respect of additional time). The Certifier's determination of any extension of time included in a tie Change Order shall, saving in cases of fraud and error in calculation, and subject to the Dispute Resolution Procedure, be binding on Infraco and tie.
- 5.2 In accordance with paragraph 7.2 of Appendix B of Schedule Part 45 to the Infraco Contract (Pricing), as soon as any On Street Works Estimate has been agreed or determined, the Certifier shall issue a tie Change Order to Infraco reflecting the same.



## SCHEDULE PART 2

### The Fee

The Fee shall be the total number of hours worked by the Certifier in the relevant month multiplied by the applicable rate, the applicable rate being:

- £125 per hour in respect of the first 3 days per week; and
- £90 per hour in respect of any additional days in the relevant week.

This Fee is inclusive of all outlays and expenses, with the exception of:

- the Certifier's reasonably and properly incurred legal fees in respect of the negotiation and entering into this Appointment; and
- the increase of the Certifier's professional indemnity insurance from £2 million to £10 million any one claim,

which shall be payable in accordance with Clauses 8.4 and 8.5.

