

among

(1) **tie** LIMITED

and

(2) THE CITY OF EDINBURGH COUNCIL

and

(3) BILFINGER BERGER CIVIL UK LIMITED

and

(4) SIEMENS plc

and

(5) CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.

**Memorandum of Understanding**

**in respect of the**

**EDINBURGH TRAM NETWORK**

## MEMORANDUM OF UNDERSTANDING

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) **THE CITY OF EDINBURGH COUNCIL** the local authority for the City of Edinburgh constituted in terms of the Local Government etc (Scotland) Act 1994 and having its principal offices at City Chambers, High Street, Edinburgh EH1 1YJ ("**CEC**");
  - (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; and
  - (5) **CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.**, a company registered in Spain and having its registered office at J. M. Iturrioz 26, 20200 Beasain, Spain ("**CAF**") which expression shall include its personal representatives, successors, permitted assignees and transferees,
- (3), (4) and (5) together the "**Infraco**".

## BACKGROUND

- A **tie** and Infraco (at that time comprising BBUK and Siemens) entered into a contract on 14 May 2008 under which Infraco was appointed to carry out and/or manage the design, construction, installation, commissioning, tram procurement, system integration, infrastructure maintenance, tram maintenance and supply of related equipment and materials, trams and related infrastructure in respect of the Edinburgh Tram Network (such contract, amended as detailed below, is herein after referred to as the "**Infraco Contract**");
- B By an agreement in writing dated 13 May 2008 ("**Tram Supply Agreement**") **tie** appointed CAF to design, manufacture and supply 27 Trams and to supply documentation and associated equipment in connection with the Edinburgh Tram Network;
- C By an agreement in writing dated 13 May 2008 ("**Tram Maintenance Agreement**") **tie** appointed CAF to provide services for the ongoing maintenance of the Trams and for the supply of consumables and spares for the Trams in connection with the Edinburgh Tram Network;
- D By a Minute of Variation in writing dated 14 May 2008 ("**MoV1**"), **tie**, BBUK, Siemens and CAF agreed that CAF would become a party to the Infraco Contract;
- E By agreements in writing dated 14 May 2008 ("**Novation of Tram Supply and Tram Maintenance Agreements**") **tie** and Infraco agreed, with the consent of CAF as the Tram Supplier and Tram Maintainer, that Infraco would take over the rights and liabilities of **tie** as the "Client" (as defined in the Tram Supply Agreement and Tram Maintenance Agreement) under the Tram Supply and the Tram Maintenance Agreements;
- F The Infraco Contract was amended by the Princes Street Supplemental Agreement entered into between the Parties in March 2009 and re-executed on 29 May 2009, a

Minute of Variation between the Parties dated 3 June 2009 ("**MoV2**") and a Minute of Variation between the Parties dated 23 April 2010 ("**MoV3**");

G Following a mediation between the Parties which took place at Mar Hall between 8 and 12 March 2011 ("**Mediation**"), **tie** and Infraco entered into a Minute of Variation dated 20 May and 10 June 2011 ("**MoV4**") in order to vary the Infraco Contract to give effect to the Prioritised Works (as therein defined);

H The Parties and CEC had also proposed to enter into a settlement agreement on or before 30 June 2011 to give effect to the negotiations resulting from Mediation but they have been unable to conclude those negotiations in the time available; and

I The Parties and CEC now wish to enter into this Memorandum of Understanding in order to: set out what has been agreed in principle; set out what remains to be agreed; and extend the timescale for the conclusion of such negotiations until 31 August 2011.

## 1. **DEFINITIONS AND INTERPRETATION**

1.1 The definitions given in the recitals to this Memorandum of Understanding and those set out below apply to this Memorandum of Understanding:

1.1.1 "**Effective Date**" means 30 June 2011; and

1.1.2 "**Outstanding Matters**" means those matters to be agreed between the parties including those set out in Part 2 of the Schedule.

1.1.3 "**Agreed Commercial Matters**" means those matters set out in Part 4 of the Schedule.

1.2 Unless the context otherwise requires, where the Infraco Contract has defined a meaning to any capitalised word or expression used in this Memorandum of Understanding, the same meaning shall be given to it in this Memorandum of Understanding.

1.3 Clause headings in this Memorandum of Understanding are for the convenience of the parties to this Memorandum of Understanding only and do not affect its interpretation.

1.4 Unless the context otherwise requires:

1.4.1 words importing gender include masculine, feminine and neuter;

1.4.2 the singular includes the plural, and vice versa; and

1.4.3 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 Memorandum of Understanding and 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. **SETTLEMENT AGREEMENT**

2.1 The Parties and CEC acknowledge and agree that:

2.1.1 Subject to Outstanding Matters (which remain to be agreed) the current draft settlement agreement is annexed as Part 1 of the Schedule; and

2.1.2 The Agreed Commercial Matters have been agreed and will be reflected in the settlement agreement.

2.2 The Parties shall use reasonable endeavours to agree the Outstanding Matters by 31 July 2011.

3. **VARIATION OF MOV4**

3.1 The Parties and CEC agree that MOV4 shall with effect from the Effective Date be varied in terms of Part 3 of the Schedule.

3.2 Save insofar as varied hereby, MOV4 shall remain in full force and effect.

4. **NON BINDING EFFECT**

4.1 With the exception of Clause 3, this Memorandum of Understanding shall not create any legally binding obligations on any of the Parties and CEC.

5. **LAW AND JURISDICTION**

5.1 This Memorandum of Understanding and any matters arising from this Memorandum of Understanding shall be governed by and construed in accordance with Scots law.

5.2 The Parties and CEC hereby irrevocably submit to the exclusive jurisdiction of the Court of Sessions in relation to this Memorandum of Understanding and any such matter.

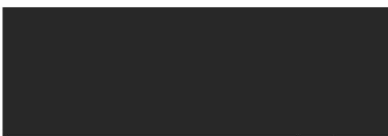
**IN WITNESS WHEREOF** these presents on this and the preceding 3 pages together with the Schedules which are annexed and subscribed as relative hereto are executed as follows:

**EXECUTED** for and on behalf of **the LIMITED**

at *Edinburgh*

on *24 August* 2011 by:

Authorised Signatory



Full Name

*VICTOR E. EMERY*

Witness Signature



Full Name

*CAROL ANNE STEWART CAMPBELL*

Address



**EXECUTED** for and on behalf of **THE CITY OF EDINBURGH COUNCIL**

at *Edinburgh*

on *24 August* 2011 by:

Authorised Signatory



Full Name

*SUSAN MARGARET BRUCE*

Witness Signature



Full Name

Address

EXECUTED for and on behalf of **BILFINGER  
BERGER CIVIL UK LIMITED**

at *Edinburgh*

on *24 August* 2011 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

EXECUTED for and on behalf of **SIEMENS PLC**

at *Edinburgh*

on *24 August* 2011 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

EXECUTED for and on behalf of **CONSTRUCCIONES  
Y AUXILIAR DE FERROCARRILES S.A.**

at *Edinburgh*

on *24 August* 2011 by:

Authorised Signatory

Full Name

Witness Signature

Full Name

Address

**SCHEDULE**

**Part 1**

**Draft Settlement Agreement**

## SCHEDULE

### Part 2

#### Draft Settlement Agreement

##### Outstanding Matters

###### Terms and Conditions of Settlement Agreement

"Preliminaries Fee": to be agreed whether the same shall be a lump sum or percentage.

Clause 4.1(a),(b),(c) and (d) the extent of the exception set out in this clause is to be agreed.

Clause 5.7.1 BBUK/Siemens will only agree to provide the warranty referred to in this clause if CAF agree to provide the undertaking referred to in clause 5.7.2.

Clause 5.7.2 CAF have not agreed to provide this undertaking.

Moratorium of Termination: CAF are seeking a moratorium on termination of the Infraco Contract before 1 September 2011.

CAF pre-novation claims: CAF have not agreed that all their pre-novation claims will be settled on novation.

CAF Claims between date of Settlement Agreement and Novation Date:

CAF are seeking to preserve claims that arise between the date of the Settlement Agreement and the Novation Date.

Any amendments to the terms and conditions of the draft settlement agreement required to reflect the principles set out in the Interface Agreement and the final form of the Tram Maintenance Agreement and Tram Supply Agreement, which is not yet agreed.

Tram 252 CAF are seeking to preserve the protection offered by MoV3 in relation to Tram 252 for events prior to Novation.

###### Infraco Contract Amendments

These have not yet been agreed but BBUK/Siemens have accepted that in relation to the Off Street Works, risk will be substantially transferred to them. In relation to the On Street Works, it has been agreed that BBUK/Siemens will endeavour to agree a fixed price for such works subject to pricing assumptions which have yet to be finalised.

The amendments to the Infraco Contract have not been agreed in detail.

The revisions required to Schedule part 2 (Employer's Requirements) have not been agreed.

The revisions to the Programme have not been agreed.

The On Street Works Contract Price and the mechanism for adjusting that price on the occurrence of pricing assumptions have not been agreed.





## Tram Supply Agreement Tram Maintenance Agreement Amendments

The proposed amendments to the Tram Supply Agreement and Tram Maintenance Agreement have not been agreed between the Parties.

Heads of Terms Clause 2	Parties to agree detailed drafting on Delay Costs
Heads of Terms Clause 4	Parties to agree amendments required to implement Clause 4. Heads of Terms Clause 8 Parties to agree detailed drafting on the acceptance of 27 Trams
Heads of Terms Clause 9	Parties to agree detailed drafting on payments during commissioning
Heads of Terms Clause 11	Parties to agree detailed drafting on dealing with "Excess Trams"
Heads of Terms Clause 12	Parties to agree amendments required to implement Clause 12.
Clause 7A/9A	CAF reject that Equivalent Project Relief should apply
Clause 58	CAF reject that the No Fault Termination right should remain
General	CAF require a series of amendments to reflect the internal layout change order
General	CAF require a series of amendments to reflect the position in relation to Tram 252
General	CAF are considering the definition of "CEC" under the Tram Supply Agreement and the Tram Maintenance Agreement, the amendments to clauses 8.3.1, 31.3 and 41.28 of the Tram Supply Agreement, the definition of "Excusing Cause" under the Tram Maintenance Agreement and clause 30.1 and 45.16 of the Tram Maintenance Agreement.
Interface Agreement	The amendments to the Tram Supply Agreement and Tram Maintenance Agreement required as a result of the contractual arrangements reflected in the Interface Agreement have not been agreed.
Employer's Requirements	The revisions required to Schedule part 2 (Employer's Requirements) have not been agreed.
Programme	The revisions to the Tram Manufacturing and Delivery Programme have not been agreed.
Tie and Infraco Compliance with the Infraco Contract	CAF need comfort that tie and Infraco comply with the Infraco Contract in so far as that impacts on CAF.
Novation on Termination of Infraco Contract	

Mechanism for agreeing amendments to the Tram Supply Agreement/Tram maintenance Agreement or terminating them to be discussed.

Insurance

Position to be discussed and agreed.

## SCHEDULE

### Part 3

#### MOV4 variations

In the definition of "Minute of Variation 5" delete "1 July 2011" and insert "31 August 2011".

In the definition of "Relevant Date" delete "2 July 2011" and insert "1 September 2011".

Clause 3.3: delete "1 July 2011" and insert "31 August 2011".

Clause 3.3.1: delete "between 2 July 2011 and 1 September 2011" and insert "until 31 August 2011".

Clause 3.3.5 insert on line 2 after "in accordance with Clauses" a reference to "3.3.6".

Clause 3.3.6 delete the drafting prior to "save as agreed between the Parties pursuant to Clause 3.3.4" and replace with the following:

"3.3.6 without prejudice to Clause 3.3.4 and unless otherwise agreed:

(i) on the date of delivery of the Trams, the Tram Related Equipment and Depot Equipment (as defined in the TSA) as referred to in clause 3.3.6 tie, or CEC as directed by CEC, shall acquire such Trams, the Tram Related Equipment and the Depot Equipment specified or comprising part of the Tram Supply Obligations;

(ii) on the date of termination CEC shall notify CAF of the location which in any event shall have a level of security at least equivalent to the Depot (as defined in the TSA) ("the Delivery Location") to which the Trams, the Tram Related Equipment and the Depot Equipment (as defined in the TSA) are to be delivered and from the date of termination CAF shall use reasonable endeavours to deliver the Trams, the Tram Related Equipment and the Depot Equipment (as defined in the TSA) specified or comprising part of the Tram Supply Obligations to tie or CEC as directed by CEC at the Delivery Location as soon as possible and in any event shall deliver five Trams to tie or CEC as directed by CEC at the Delivery Location no later than 15<sup>th</sup> October 2011 (the "Initial Trams") and in any event shall deliver the remaining Trams, the Tram Related Equipment and the Depot Equipment to tie or CEC as directed at the Delivery Location no later than 31<sup>st</sup> October 2011; and

(iii) within 5 business days of the date of delivery of the Initial Trams tie, whom failing CEC, shall pay to CAF 5/27 of the Unpaid Sums less the Certified Deduction in respect of the Initial Trams. The remaining 22/27 of the Unpaid Sums less the Certified Deduction in respect of the remaining Trams the Tram Related Equipment and the Depot Equipment shall be paid by tie, whom failing CEC, to CAF within 5 business days of the date of delivery of such

remaining Trams, the Tram Related Equipment and Depot Equipment to tie or CEC. In addition tie, whom failing CEC, shall pay to CAF interest at the rate of 2% over the base rate of the Bank of England from time to time as follows:

(a) in respect of the payment of the sum due relating to the Initial Trams for the period between 1 September 2011 and the date of payment of the said sum due (except any period of delayed payment that arises because CAF has failed to deliver the Initial Trams by 15 October 2011 notwithstanding CEC's compliance under clause 3.3.6(ii) regarding the notification of and level of security of the Delivery Location); and

(b) in respect of the payment of the sums due relating to the remaining Trams, the Tram Related Equipment and the Depot Equipment for the period between 1 September 2011 and the date of payment of the said sum due (except any period of delayed payment that arises because CAF has failed to deliver the remaining Trams, the Tram Related Equipment and the Depot Equipment by 31 October 2011 notwithstanding CEC's compliance under clause 3.3.6(ii) regarding the notification of and level of security of the Delivery Location).

In the event that any Unpaid Sums less any Certified Deduction results in a negative figure then such sum shall be payable by CAF to tie or CEC as directed by CEC.

Provided that nothing in this Clause 3.3.6 shall operate to vary or amend the terms of the Tram Supply Agreement or act as an admission by BBUK or Siemens of any liability to CAF under the Tram Supply Agreement, Infraco Contract or consortium agreement.

"Certified Deduction" means such sum as the Certifier certifies under the Certifier Agreement should be deducted from the Unpaid Sums to reflect the difference in value attributable to what CAF have delivered under Clause 3.3.6 and what CAF would have been obliged to deliver had the Infraco Contract not been terminated, provided that in relation to the Initial Trams the Certified Deduction shall relate only to the difference in value attributable to the Initial Trams;

"Unpaid Sums" means all milestone payments set out in Schedule 5 to the TSA that remain unpaid notwithstanding that the milestones to allow application for payment of such milestone payments have not occurred."

- Clause 3.4: delete "1 July 2011" and insert "31 August 2011".
- Clause 3.4.1: delete "1 July 2011" and insert "31 August 2011".
- Clause 3.4.2: delete "2 July 2011" and insert "1 September 2011".
- Clause 14.3: delete "2 July 2011" and insert "2 September 2011".



## SCHEDULE

### Part 4

#### Agreed Commercial Matters

1. The Contract Price for the Off Street Works is £362,500,000.

Following Mediation, BBUK and Siemens have developed the following Prices and have provided these to CEC for consideration and agreement. These are subject to contract.

1. The Target On Street Works Contract Price is £52,608,034 (BBUK £33,322,586 and Siemens £19,285,448).
2. The termination amounts payable in the event that the Funding Satisfaction Date does not occur on or before the Termination Date shall be BBUK £27,761,517 and Siemens £38,488,963.