

DATED

2007

(1) ~~tie~~ LIMITED

- and -

(2) Bilfinger Berger UK Limited

-and-

Siemens Transportation Systems
A division of Siemens plc

AGREEMENT

relating to

**SELECTION FOR APPOINTMENT AS
PREFERRED BIDDER**

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THIS AGREEMENT is made on 2007

BETWEEN

(1) **tie LIMITED**, a company incorporated with registration number SC230949, and having its registered office at City Chambers, Edinburgh, Midlothian EH1 1YJ ("tie")

(2) **BBS**, a prequalified unincorporated consortium (contracting on a joint and several basis), comprising:-

Bilfinger Berger UK Limited, a company incorporated with registration number 2418086, and having its registered office at 150 Aldersgate Street, London EC1A 4EJ and

Siemens Transportation Systems, a division of Siemens plc, a company incorporated with registration number 727817, and having its registered office at Faraday House, Sir William Siemens Square, Frimley, Camberley GU16 8QD ("Bidder")

WHEREAS

(A) In the Invitation to Negotiate ("ITN") dated 3 October 2006, tie formally invited tenders for a comprehensive or turnkey contract in relation to the Edinburgh tram network, trams and related infrastructure ("Infraco Contract").

(B) Following a negotiated procedure, tie has invited final technical, legal, commercial and financial offers ("Submissions") from the two bidders who responded to the ITN ("Bidders"), tie intends, having evaluated the Submissions in accordance with the methodology and those criteria described in the ITN, to select one Bidder for appointment as the preferred bidder ("PB") in relation to the Infraco Contract subject always to formal approval of that selection by the CEC. The contents of the Submissions now form the basis of the Draft Deal for each of the Bidders.

(C) This Agreement sets out the terms on which the Bidder will accept appointment as PB, should this be tie's decision.

IT IS HEREBY AGREED

1. DEFINITIONS

In this agreement, the following capitalised expressions shall have the following meanings:

"CEC" means the City of Edinburgh Council;

"Contract Terms" means those contract terms and the schedule of items to be agreed during the Preferred Bidder Period as contained in Appendix 1;

"Draft Deal" means the draft contract package comprising:

1. this Agreement;
2. the draft Infraco Contract Terms;
3. the Employer's Requirements;
4. the Draft Infraco Proposals
5. the Price;
6. the PB Finalisation Issues; and
7. the PB Finalisation Programme;
8. the Tenderer's Queries and tie's responses, and the Infraco Clarification Questions and the Bidder's responses

"Draft Infraco Proposals" means the proposals submitted to tie as contained in Appendix 5;

"Employer's Requirements" means those requirements supplied to the Bidder by tie [with reference [♦]] as amended to resolve inconsistencies and conflict with the Draft Infraco Proposals noted in the compliance matrices set out in the Employer's Requirements and as Appendix 4;

"Infraco Clarification Questions" means the Infraco clarification questions as listed in the Draft Deal as Appendix 5;

"PB Finalisation Issues" has the meaning given to it at clause 3.1;

"PB Finalisation Programme" means the programme set out at Appendix 7 to this Agreement (as may be amended from time to time with the agreement of both Parties) within which the Bidder will use reasonable endeavours to resolve the PB Finalisation Issues

"Preferred Bidder Period" means the period between selection of a Preferred Bidder and award of the Infraco Contract and concurrent novation of tie's contracts with SDS and Tramco to Infraco.

"Price" means that financial proposal and all associated information as contained in Appendix 5;

"SDS" means Parsons Brinckerhoff Limited, a company registered with number 2554514 and having its registered office at Amber Court, William Armstrong Drive, Newcastle Business Park, Newcastle Upon Tyne NE4 7YQ, engaged by tie Limited under a contract dated 19 September 2005;

"SDS Contract" means the contract entered into by tie Limited and SDS dated 19 September 2005;

"Subcontractors" means collectively SDS and Tramco;

"Tenderer's Queries" means queries raised by the Bidder in accordance with part 4.7 of the Instructions to Tenderers included in Volume 1 of the Tender Documents, "Infraco ITN and Appendices" and as contained in Appendix 5;

"Tramco" means CAF, selected by tie as preferred bidder for the award of the Tramco Contract;

"Tramco Contract" means the contract to be entered into by tie with Tramco, substantially in the form reviewed by the Bidder and to be novated to the Bidder and as contained in Appendix 3.1 and 3.2;

"Working Day" means any day other than a Saturday or Sunday or a public holiday recognised by CEC;

2. DRAFT DEAL

- 2.1 The Bidder and tie agree and confirm that the Draft Deal constitutes the entirety of its proposal to deliver the Edinburgh Tram Network and, therefore, the terms on which it will be appointed as PB, should this be tie's decision.
- 2.2 Subject only to clause 3 the Bidder and tie accordingly agree that any appointment of the Bidder as PB by tie is solely on the basis that the Bidder and tie adhere in all respects to the terms of the Draft Deal, and that unless otherwise agreed, the Bidder

or tie will neither require, propose or procure circumstances to cause any change to the terms of any aspect of the Draft Deal or to any other matter relating to the Submission, the Infraco Contract, the SDS Contract or the Tramco Contract other than to resolve the PB Finalisation Issues.

- 2.3 tie undertakes to procure from CEC a payment guarantee in respect of all of tie's payment obligations under the Infraco Contract in terms satisfactory to the Bidder, acting reasonably
- 2.4 All e-mail correspondence between the Parties from 7th August 2007 not subsequently superseded or where there is either ambiguity or need for clarification forms part of the Draft Deal

3. PB FINALISATION

- 3.1 tie and the Bidder acknowledge and agree that there are a number of matters contained in the Draft Deal, the Infraco Contract, the SDS Contract and the Tramco Contract which must be resolved before tie seek CEC approval to enter into the Infraco Contract with PB ("PB Finalisation Issues"). The PB Finalisation Issues are more particularly set out at Appendix 7.1 to this Agreement.
- 3.2 Should the Bidder be appointed by tie as PB, tie and the Bidder will act in good faith to agree the PB Finalisation Issues in accordance with the PB Finalisation Programme.
- 3.3 tie will amend the Draft Deal to reflect the agreements reached between tie and PB in relation to the PB Finalisation Issues pursuant to this clause 3.

4. STATUS AS PREFERRED BIDDER

- 4.1 Should tie appoint the Bidder as PB, tie will have the right (without prejudice to any other right that tie might have under any contract, pursuant to the ITN or at law as a result of any of the matters referred to in this clause 4.1) to terminate the Bidder's status without compensation as PB subject to seven days written notice if:
- 4.1.1 the Bidder commits any material breach of the terms of this Agreement:

- 4.1.2 the Bidder proposes, requires any change or procures circumstances which result in any change to any aspect of the Draft Deal which is not a PB Finalisation Issue, unless otherwise agreed to by tie.
 - 4.1.3 progress against the PB Finalisation Programme is such that in tie's opinion the PB Finalisation Issues will not be resolved such that a Contract Award and concurrent novation of Tranco and SDS is unlikely to take place by 28th January 2008
 - 4.1.4 the Bidder and tie are unable to agree the final terms of an option for Phase 1b on terms acceptable to tie,
- 4.2 Should tie appoint the Bidder as PB, the Bidder will have the right (without prejudice to any other right that the Bidder might have under any contract, pursuant to the ITN or at law) as a result of any of the matters referred to in this Clause 4.2 to terminate its status without compensation as PB and decline to enter into an Infraco Contract with tie subject to seven days notice if:
- 4.2.1 the Bidder and tie are unable to agree, to the satisfaction of tie, any one or more of the PB Finalisation Issues in accordance with the PB Finalisation Programme; or
 - 4.2.2 tie proposes, requires any change or procures circumstances which result in any change to any aspect of the Draft Deal which is not a PB Finalisation Issue, unless otherwise agreed to by the Bidder;
 - 4.2.3 The Infraco Contract has not been executed on or before 3 months after the date scheduled for execution of the Infraco Contract in the PB Finalisation Programme, unless otherwise agreed by the Parties;
 - 4.2.4 tie fails to procure a payment guarantee from CEC in accordance with Clause 2.3;
 - 4.2.5 The City of Edinburgh Council do not accept tie's Infraco Contract award recommendation;
 - 4.2.6 Transport Scotland do not approve tie's Business Case for the Project;
 - 4.2.7 The Scottish Executive do not provide adequate funding for the Project;

- 4.2.8 Risks and inconsistencies identified by the Bidder as a result of the outcome of the due diligence referred to in Clause 7 are not dealt with in accordance with this Agreement to the Bidder's satisfaction (acting reasonably).
- 4.3 tie shall not be obliged to, but at its sole discretion may, award a contract to the PB where
- 4.3.1 The estimated infrastructure works cost for Phase 1a as finalised during the Preferred Bidder Period exceeds or is forecast to exceed £218.5m inclusive of the Infraco Contract Price
- 4.3.2 The estimated infrastructure works of Phase 1b as finalised during the Preferred Bidder Period exceeds or is forecast to exceed £55m inclusive of the Infraco Contract Price. The estimated total project cost for Phase 1a exceeds £500m, as estimated by tie
- 4.3.3 The City of Edinburgh Council do not accept tie's contract award recommendation
- 4.3.4 Transport Scotland do not approve tie's Business Case for the Project
- 4.3.5 The Scottish Executive do not provide adequate funding for the Project
- 4.4 Should tie decide not to appoint the Bidder as PB, the Bidder agrees to remain committed as a reserve bidder. Accordingly, subject to Clause 2, the Draft Deal will remain the basis of an offer by the Bidder capable of acceptance by written notice by tie to the Bidder until the end of March 2008 subject to any justifiable adjustments to price and programme to reflect the impact of the elapsed time between the date of this Agreement and the date of the notice. Following any such notice, the Bidder agrees that if tie serve a written notice prior to the end of March 2008 on the Bidder, appointing it as PB, it will at that point assume the status of PB.
- 4.5 tie reserves the right to negotiate with the reserve bidder at any time prior to award of the Infraco Contract, but shall inform the Bidder within 4 Working Days of commencing such negotiations.

5. NOVATION

- 5.1 The Bidder accepts and acknowledges that, should tie appoint it as PB, it will be required, (unless tie, at its absolute discretion agrees otherwise, to and shall enter into novation agreements with tie, Tramco and SDS to novate the relevant contracts to the Bidder on the same day that it executes the Infraco Contract, unless otherwise agreed between the Parties.
- 5.2 Without prejudice to any other specific rights of tie in relation to these novations at law, under any contract or as set out in the ITN and the relevant novation agreements, the Bidder and tie will use all reasonable endeavours to cooperate in relation to these novations and to ensure that they are fully effective.
- 5.3 The Bidder shall not be obliged to enter into any novation of the Tramco and SDS Contracts until the PB Finalisation Issues having an impact thereon have been resolved to tie's and the Bidder's satisfaction.

6. VALUE ENGINEERING AND MANAGEMENT OF SDS

- 6.1 The Bidder will, if tie appoints it as PB, use all reasonable endeavours to cooperate with tie in relation to Value Engineering with a view to delivering the cost reductions in respect of "Value Engineering Items" as set out in Appendix 5.
- 6.2 The Bidder will participate in the management of the SDS provider to deliver the design outputs (Design Deliverables), including changes to accommodate Value Engineering savings and including:-
- 6.2.1 Attending management meetings with tie and SDS
 - 6.2.2 Review progress on design delivery and to work with tie and SDS to overcome issues impeding progress whilst maintaining alignment with the Bidder's construction programme
 - 6.2.3 To advise tie on the prioritisation of SDS design and to advise details of designs that are not required by the Bidder
 - 6.2.4 Assist tie in the validation of the quality of SDS designs produced

7. DUE DILIGENCE

7.1 The Bidder agrees to conduct due diligence in respect of the following:-

7.1.1 The Deliverables provided under the SDS contract (as defined therein) in order to a) confirm acceptance of the system performance requirements set out in the Employer's Requirements and b) confirm the acceptability in terms of quality of the SDS Deliverables produced; and

7.1.2 The status of the Deliverables of the SDS Contract, Tramco Contract Employer's Requirements, finalised OCIP Insurances (as defined in the Infraco Contract) and other relevant third party agreements it will be required to accept liability therefor under the Infraco Contract; and

7.1.3 The terms of the Employer's Requirements for consistency with the Draft Infraco's Proposals

and to conclude this due diligence exercise in accordance with the PB Finalisation Programme.

8. MOBILISATION AND ADVANCE WORKS

tie undertakes to enter into a mobilisation and advance works agreement for the Edinburgh Tram Network in substantially the form set out in Appendix 1.6 to this Agreement in accordance with the requirements in relation to advance works set out in Appendix 5. tie acknowledges and agrees that if the mobilisation and advance works is not awarded by 1st November 2007 the overall programme for delivery of the Edinburgh Tram Network will have to be adjusted to take account of such delay.

9. DISPUTE RESOLUTION

9.1 In the event of any Dispute in relation to this Agreement the Chief Executives of the respective Parties will meet to resolve the issue.

9.2 This Agreement shall be governed by and construed in accordance with Scottish law and any dispute arising between the Parties shall be subject to the non exclusive jurisdiction of the Scottish Courts.

10. CONDITIONS PRECEDENT

Except for the provisions of Clause 4.4 and 4.5 the obligations of the Parties under this Agreement shall be conditional upon the appointment of the Bidder as PB.

EXECUTED for and on behalf of the LIMITED at

on the 22 OCT 2007

Authorised signatory: [REDACTED]

Full name: WILLIAM CALLAGHER

EXECUTED for and on behalf of [SSS] at

on the 22 Oct. 2007

Authorised signatory: [REDACTED]

Full name: NICOLA JANE DAVENPORT STEPHEN ALEXANDER WRIGHT

APPENDIX 1

PB Finalisation Issues

*[APPENDIX 2
PB Finalisation Programme]*