

# SIEMENS

## Industry Building Technologies Division

### Project Development Agreement

Siemens Industry, Inc., a Delaware corporation, through its Building Technologies Division, with its principal place of business located at 1000 Deerfield Parkway, Buffalo Grove, Illinois 60089 ("Siemens"), and Town of Brownsburg, with its principal place of business located at 61 North Green Street, Brownsburg, Indiana 46112 ("Client") (collectively the "Parties"), enter into this Project Development Agreement this day of September, 2012 ("PDA") and agree as follows:

#### RECITALS

WHEREAS, Siemens has been selected, August 9, 2012 via the RFQ responses receive by the Client to perform certain savings estimation work, as more specifically described herein (the "Work") for the Client;

WHEREAS, the Parties agree that Siemens will perform work under this PDA with the intention that Siemens will prepare a draft Performance Contracting Agreement ("PCA"), which PCA shall be subject to full negotiation by the Parties hereto, and which may be accepted or rejected by the Client, in its sole and absolute discretion;

WHEREAS, as part of the Work, and if Siemens is selected by the Town, as determined in the Town's sole discretion, for a PCA, then Siemens' obligations under the PCA will include a guarantee by Siemens of the estimated savings intended to be generated by implementing the scope identified therein;

WHEREAS, Siemens must first perform an in-depth energy audit of Client's facilities to determine a feasible scope of work and estimated savings to be included in the PCA ("Investment Grade Audit" or "IGA"); and,

WHEREAS, the Parties agree that Siemens shall perform the IGA in accordance with the terms herein and that the Client shall pay Siemens in accordance with the same.

**NOW THEREFORE**, as a result of the Recitals, which are specifically incorporated herein and for the mutual consideration contained herein, the Parties agree as follows:

#### AGREEMENT

1. Term. Upon the date hereof, or upon such later date as agreed upon by the Parties (the "Effective Date"), Siemens shall commence performing the IGA. The term for performing the IGA shall conclude upon the submission of the draft PCA to the Client by Siemens. Siemens shall use reasonable efforts to complete the IGA no later than one hundred-sixty (160) days from the Effective Date.

2. Scope of Work. The "Work" to be performed by Siemens shall be as more particularly described on Exhibit "A", attached hereto and made a part hereof.

3. Required Information. The Client authorizes Siemens, its employees, agents, consultants and subcontractors, on a need to know basis, to inspect and copy all information and data that Siemens reasonably deems is necessary to sufficiently perform the IGA, whether such information is in the Client's possession or in the possession of a third-party to which the Client shall provide Siemens with sufficient releases in order to obtain such information. The Client shall provide Siemens, its employees, agents and contractors, with reasonably unrestricted access to the Client's buildings that will be addressed in the IGA (the "Facilities"). In addition, Client shall promptly provide Siemens with the Facilities:

- a. Utility data for the past two (2) year(s), including but not limited to, actual copies of electrical, gas, water invoices, or other utility invoices requested by Siemens ("Utility Data");
- b. Information on the Facilities' hours of operation and modes of operation ("Operational Data");
- c. Names and contact information of persons with whom Siemens can confer regarding any of the Utility Data, Operational Data, financial information and general day-to-day issues that may arise during performance of the IGA ("Contact Persons");
- d. If applicable, an audited financial statement for the fiscal year immediately preceding the Effective Date; and,
- e. Any and all information requested by Siemens reasonably necessary in order for Siemens to perform the IGA, to the extent that such information's disclosure is not prohibited by Indiana law or any contractual confidentiality provision that the Town is currently obligated under. To the extent that Siemens cannot get information from Client necessary to generate the IGA meeting the Project Criteria, it may terminate this Agreement with fifteen (15) days prior written notice to Client. The Client shall then pay to Siemens a termination fee equal to Siemens' reasonable costs and expenses incurred up to the date of termination.

#### 4. Representations, Warranties and Covenants of the Parties.

- a. Each party represents, warrants and covenants to the other that:
  - i. It has all requisite power and authority, whether statutory or otherwise, to enter into this Agreement, and that its execution hereof has been duly authorized and does not and will not constitute a breach or violation of any of its organizational documents, any applicable laws or regulations, or any agreements with third parties;
  - ii. It has done and will continue to do all things necessary to preserve and keep in full force and effect its existence and the PDA;
  - iii. This PDA is a legal, valid and binding obligation of the party, in accordance with its terms, and all requirements of the party have been met and procedures have been followed by the party to ensure the enforceability of the PDA; and,
  - iv. To the party's best knowledge, there is no pending or threatened suit, action, litigation or proceeding against or affecting the party that impacts the validity or enforceability of this PDA.
- b. Siemens further represents, warrants and covenants to the Client that Siemens is duly authorized to do business in all locations where the work under the PDA is to be performed.
- c. Client further represents, warrants and covenants to the Siemens that 1) any information provided to Siemens, or that is provided to Siemens, by the Client or on behalf of the Client, to the best of its knowledge, is accurate and that Siemens is entitled to rely on the accuracy of the same in performing the IGA, and 2) Siemens shall not be held liable to the Client in any manner whatsoever for any error, inaccuracy or omission

that is caused solely by Siemens' reliance on the information supplied by the Client or information provided to Siemens on behalf of the Client.

d. Siemens further represents and warrants that it shall endeavor to perform the preparation of the PCA diligently, expeditiously, and with adequate resources so as to complete the preparation of the PCA in a commercially reasonable timeframe, and to complete its work in a professional manner consistent with prudent industry standards..

5. Fee. Siemens shall perform the IGA for the fixed fee of \$ ~~331,700~~ three hundred and thirty-three thousand seven hundred dollars and no cents (the "Fee") which is based on Siemens undertaking the tasks and activities in Exhibit A.

6. Payment of the Fee.

a. In the event that Siemens completes the tasks identified in Exhibit A ("Project Criteria") and presents an IGA demonstrating that a project will be feasible as scope to be performed under the PCA and Siemens is able to draft a PCA to include the project presented in the IGA, then the Client shall be liable to Siemens for the Fee.

b. On the Effective Date and during the period of time that the IGA is being performed, Siemens will direct resources to develop the draft PCA. Where a draft PCA is completed, it will be submitted to the Client within the time period set forth in Section 1 hereof. The draft PCA will include a price that will include the Fee amount. Therefore, if the PCA is executed, the Client will have no obligation to pay the Fee under the terms hereof as the Fee will be paid to Siemens under the terms of the PCA.

c. In the event that the Client is liable to Siemens for the Fee pursuant to clause 5.a. and Siemens has provided the Client with a draft PCA pursuant to clause 5.b., but the Client does not enter into the PCA with Siemens within thirty (30) days following submission of the draft PCA to the Client, Siemens will submit an invoice to the Client for the Fee. The Client shall pay Siemens in immediately available funds no later than thirty (30) days from the date of invoice. In addition, nothing contained herein shall require Client to enter into a PCA with Siemens.

d. If during the performance of the IGA, Siemens believes that the Project Criteria cannot be reasonably achieved and, therefore, a draft PCA cannot be provided to the Client, then the Client shall not have any obligation to pay the Fee.

7. Termination. The Client may terminate this Agreement at any time with fifteen (15) days prior written notice to Siemens. The Client shall then pay to Siemens a termination fee equal to Siemens' reasonable costs and expenses incurred up to the date of termination.

8. Insurance. During the term of this PDA, Siemens shall maintain statutory workman's compensation coverage, employer's liability and comprehensive general liability insurance in such amounts as are set forth in its Certificate of Insurance, which is attached hereto as Exhibit B. This policy shall name the Client as an additional insured under this policy and shall provide that Siemens' coverage shall be the primary coverage in the event of an insurable loss under this PDA. This policy shall also insure the indemnification obligations of Siemens set forth under this PDA. A certificate of insurance which verifies the existence of this insurance coverage must be provided to the Client before Siemens begins any work under this PDA.

9. Indemnity. Siemens and the Client shall indemnify and hold each other harmless from and against all damages, losses and expenses suffered or paid as a result of any and all claims,

demands, suits, causes of action, proceedings, judgments and liabilities, fines, penalties and costs, including reasonable attorney's fees and disbursements, incurred in litigation or otherwise assessed, incurred or sustained by or against the indemnified party arising out of or in connection with this PDA to the extent that such damages, losses and expenses result from the negligence or willful misconduct of the indemnifying party.

SIEMENS' AGGREGATE LIABILITY FOR ANY AND ALL CLAIMS, LOSSES OR EXPENSES ARISING OUT OF THIS PDA, OR OUT OF ANY DELIVERABLES FURNISHED UNDER THIS PDA, WHETHER BASED IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, AGENCY, WARRANTY, TRESPASS, INDEMNITY OR ANY OTHER THEORY OF LIABILITY, SHALL BE LIMITED TO THE LESSER OF \$1,000,000 OR THE TOTAL COMPENSATION RECEIVED BY SIEMENS FROM THE CLIENT UNDER THIS PDA. 10. Exclusivity. During the term of this PDA, the Client shall not negotiate with any third-party for the same or a substantially similar project as that which is the subject of this PDA.

11. Deliverables. All non-proprietary notes and reports that are specifically prepared by Siemens under this PDA (the "Deliverables") shall become the Client's personal property upon the Client's execution of the PCA or upon the Client's payment of the Fee, whichever is earlier. Any reuse of the Deliverables for other projects or locations without the written consent of Siemens, or use other than by the Client, will be at such other user's sole risk and without liability to Siemens; and, unless expressly prohibited by law, the Client and the other users, jointly and severally shall indemnify, defend and hold Siemens harmless from any claims, losses or damages arising from such unauthorized use.

12. Intellectual Property. Notwithstanding the foregoing, the Client shall not, by virtue of this PDA, acquire any ownership interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual proprietary rights, or similar items of property which are owned by Siemens, any of Siemens' subcontractors, or by any of Siemens' consultants, whether or not they are used in connection with the work provided under this PDA.

13. Confidentiality. Any information concerning Siemens or the Client that is designated as proprietary and disclosed in confidence to the other party during the term of this PDA is disclosed in confidence. The party that receives such confidential information shall not publish or disclose the same to any other entity or person without the prior written approval of the disclosing party, provided, however, ~~that Siemens understands and agrees that~~ the Client, as a governmental entity, is obligated to disclose certain information under Indiana's Access to Public Records Act, and it shall be entitled to disclose information thereunder. To the extent that the Parties have entered into a confidentiality agreement or will enter into such an agreement during the term of this PDA, then the terms contained in the confidentiality agreement shall be incorporated by reference herein.

14. Non-Discrimination. Siemens shall not discriminate against an employee or applicant for employment with respect to his/her hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment because of race, religion, color, age, sex or national origin or ancestry. Breach of this covenant may be regarded as a material breach of the PCA. Siemens agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the policies of non-discrimination.

15. Choice of Law, Jurisdiction and Venue. THIS PDA SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF INDIANA, WITHOUT REGARD TO CHOICE OF LAW PROVISIONS. JURISDICTION AND VENUE SHALL LIE WITH THE STATE OR FEDERAL COURTS IN THE COUNTY IN WHICH THE SUBJECT PROJECT WILL BE PERFORMED. THE PARTIES EACH WAIVE ANY RIGHTS THAT EACH OF THEM MAY HAVE TO A TRIAL BY JURY. FURTHERMORE, EACH PARTY WAIVES ANY OBJECTION THAT IT MAY HAVE BASED ON IMPROPER VENUE OR FORUM NON CONVENIENS.

16. Investment Activities in Iran. As required by I.C. 5-22-16.5, the signature entered on behalf of Siemens below constitutes Siemens' certification that it is not engaged in investment activities with the government of Iran or any agency or instrumentality of the government of Iran, all as defined and regulated by Senate Enrolled Act 231, effective July 1, 2012. Siemens certification is subject to the letter dated November 1, 2012, submitted to the Client with this PDA.

17. Future Obligations. The Parties mutually understand and agree that nothing contained in this PDA shall require and/or obligate the Client to enter into any future contracts for additional services at any time with Siemens.

18. Merger Clause. Upon execution and delivery, this PDA: (a) constitutes the entire agreement and understanding between the Parties relating to the subject matter hereof; (b) supersedes any and all prior agreements and understandings of the Parties, oral or written, relating to the subject matter hereof; and, (c) shall not be amended, supplemented, contradicted or otherwise modified by evidence of prior, contemporaneous or subsequent oral agreements of the Parties.

**IN WITNESS WHEREOF**, the Parties hereto have caused this Project Development Agreement to be duly executed by their respective authorized signatories as of the date first above written.

Agreed for **Town of Brownsburg**

(Signature) by: \_\_\_\_\_

Print Name and Title \_\_\_\_\_

Agreed for **Siemens Industry, Inc.**

(Signature) by: \_\_\_\_\_

Print Name and Title: \_\_\_\_\_

## Exhibit A – Project Criteria

The objectives to be assessed in the investment grade audit (IGA) are as follows:

- Potential efficiency improvements/measures
- Opportunities to reduce operating and utility costs
- Opportunities to replace or upgrade existing equipment
- Improve water meter accuracy
- Obtain a guarantee for the PCA from Siemens

Siemens will provide the following services (“Services”) during the IGA:

Water Meter Scope:

- Obtain database of water meters and determine the appropriate test meters (residential size)
- Develop the large meter audit list
- Remove the following existing water meters and install new direct-read Neptune water meters:
  - (65) 5/8" x 3/4" PD Meter
  - (2) 1" PD Meter
  - (1) 1 1/2" PD Meter
  - (2) 2" PD Meter
- Transport and test the removed meters
- Survey the large commercial meters (sizes vary from 3" and larger)
- Analyze meter-testing results and include a list of meter sizes and locations for those surveyed
- Fee for water meter scope is \$74,300
- Development time line for water meter scope is 150 days

Pumping Station and Waste Water Treatment Plant Scope:

The following will be investigated to gain energy, maintenance and labor efficiencies:

- CSO tank bucket pumping improvements
- Grit removal system improvements
- Bar screen system improvements
- SCADA system upgrades and optimization
- Tertiary treatment and disinfection improvements
- Dewatering system improvements
- Chlorine tank improvements
- Smart irrigation upgrades
- Alternative energy solutions
- Fee for waste water treatment scope is \$162,900

- Development time line for waste water treatment scope is 180 days

#### Facilities Scope:

The HVAC, electrical, lighting, plumbing and building envelope systems of the following buildings will be investigated for efficiency improvement opportunities:

1. **Brownsburg Town Hall** – 61 North Green Street
  2. **Eaton Hall** – 61 North Green Street
  3. **Police Station & Court Building** – 31 North Green Street
  4. **Street Department campus** – 200 South Green Street
  5. **Wastewater Treatment #1** – 225 Mardale Drive
  6. **Water Department** – 220 Mardale Drive
  7. **Municipal Fleet Maintenance Building** – 221 South Mardale Drive
  8. **BPRD Maintenance Building** – 200 North Green Street
  9. **Brownsburg Police Training/Firing Range** – 75 Whittington Drive
  10. **Carnegie Library Building** – 104 East Main Street
- Fee for facilities scope is \$94,300
  - Development time line for facilities scope is 150 days

#### Typical development process:

1. Preliminary facilities survey
2. Gather utility information
3. Perform benchmark comparison
4. Develop initial facility improvement measure (FIM) list
5. Detailed facility surveys
6. Develop for each FIM:
  - a. Scope of work to allow including needed design documents
  - b. Bidding packages for internal, subcontractor and equipment quotes
  - c. Savings by fuel source including interactions between FIMs
  - d. Measurement and verification (M&V) plan by fuel source
7. Receive, review, negotiate and compile all quotes
8. Finalize savings, costs, M&V, project cash flow and contract
9. Prepare proposal
10. Present proposal to owner

#### General Scope:

- Prepare an IGA report complete with PCA costs and savings which demonstrates cash neutral or better financial results
- Investigate other facilities for opportunities as agreed between the parties – the IGA completion date for these other opportunities may be extended as agreed between the parties