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November 6, 2014

**VIA E-MAIL & U.S. MAIL:**

Mr. Steven R. Shamash, Attorney  
Siemens Industry, Inc.  
1000 Deerfield Parkway  
Buffalo Grove, IL 60089

**E-mail: [steven.shamash@siemens.com](mailto:steven.shamash@siemens.com)**

RE: September 19, 2013, Performance Contracting Agreement between  
the City of Monticello, Arkansas and Siemens Industry, Inc. (Contract)

Dear Mr. Shamash:

We write you now in behalf of the City of Monticello (City), and acknowledge receipt of your response letter dated November 4, 2014. We would note that in some instances your response letter fails to directly address problems/questions raised by our October 22, 2014, letter to Siemens Industry, Inc. (Siemens), and in other instances raises additional questions. We will, therefore, list the further questions/concerns the City has relative to this matter.

**Siemens' Failure to Provide Legally Required Letter of Credit, Cash in Escrow, Multiyear Surety Bond and/or Third-Party Credit Rating Agency Verified Investment Grade Corporation Guarantee of Promised Efficiency Savings.**

Your response letter ignores the express requirement of Arkansas law that Siemens provide certain financial assurance that it will pay any shortages in promised efficiency savings from the improvements being installed and constructed. As specifically noted in our October 22, 2014, letter to Siemens, Arkansas law, specifically Ark. Code Ann. § 14-164-402(15)(D), states:

“The qualified efficiency engineering company *shall* guarantee to the issuer the aggregate amount of efficiency savings to be derived by the issuer from the performance-based efficiency project *by providing* in favor of the issuer:

- (i) A *letter of credit* issued by a federally insured banking institution;

- (ii) An amount of cash equal to the aggregate projected efficiency savings to be placed in escrow with an independent escrow agent;
- (iii) A multi-year surety bond insuring the aggregate amount of efficiency savings guaranteed by the qualified efficiency engineering company that must remain in force throughout the term of any revenue bonds issued under this subchapter to finance any costs and expenses associated with the performance-based efficiency project;
- (iv) If the qualified efficiency engineering company has an investment-grade credit rating as established in writing addressed to the issuer by an independent third-party credit rating agency, a corporate guarantee of the qualified efficiency engineering company; or
- (v) Any combination of subdivisions (15)(D)(i)-(iv) of this section.”

Ark. Code Ann. § 14-164-402(15)(D)(Emphasis Supplied).

Consequently, demand is again made on Siemens by the City that Siemens provide to the City the legally required Letter of Credit, Cash in Escrow, multi-year surety bond and/or the written and signed guarantee of an investment grade verified corporation. If Siemens does not provide the legally required Letter of Credit, etc., to the City within the next five (5) business days, then City will be left with no choice but to consider its legal options including filing a lawsuit against Siemens over Siemens’ willful refusal to obey the clear Arkansas law governing Performance-based Efficiency Projects such as the Monticello water project.

If Siemens contends that it does not have to obey and comply with the above-quoted Arkansas law, then Siemens is requested to provide to the City a written statement of the basis for such a contention within the next five (5) business days.

Before leaving this subject, we are compelled to point out certain false statements contained in your response letter relative to same. You say that “the City long ago sold bonds on the strength of Siemen’s contractual undertaking.” That is simply not true. The \$10 Million in bonds issued by the City to finance this project were issued on the strength of City regular revenues from its water and sewer systems, including planned annual increases in water and sewer rates to be imposed, not any efficiency savings from the project.

We are further compelled to respond to your letter’s statement that our October 22, 2014, letter “suggests no subsequent change in Siemen’s financial condition that might affect its ability to honor this aspect of the Contract, as there has not been one.”

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First, it is our understanding that the City has never been provided with any information as to the financial condition of Siemens Industry, Inc., from which to “suggest” a change in same. If, however, you contend that financial information on Siemens has been provided, you are requested to provide another copy of same to the City within the next five (5) business days.

Second, even if Siemens had provided financial information on itself to the City, the above-cited and quoted Arkansas law makes no exception from compliance with the Letter of Credit, etc., financial assurance requirements for companies providing financial information.

The bottom line is either Siemens needs to obey and comply with Arkansas law on contracts such as that involved here, or it needs to explain why that law does not apply to Siemens. We look forward to having the favor of your reply shortly.

We will now turn to the other questions/concerns of the City that were raised by your response letter dated November 4, 2014.

**City’s Request for Statement of Reasons for Siemens Changing Type/Brand of Water Meters Required by Contract Specifications.**

Here your response letter first quotes the Contract language about Siemens being able to provide an “equivalent ARM system” to the new Mueller Hot Rod™ (also known as Hersey water meters) specified by the Contract. You are requested to provide the identity of the person(s) who determined that the Sensus water meters are “equivalent” to the Hersey water meters specified by the Contract, and to provide all written documentation pertaining to the reaching of such a determination. You are requested to provide that information within the next five (5) business days.

Then your response letter states that “Mayor Maxwell directed Siemens to purchase Sensus equipment on September 12, 2013.”

It is incredible, if not fraudulent, for Siemens to contend that Mayor Maxwell directed Siemens to purchase Sensus water meters on September 12, 2013, since the record of this matter indisputably shows that twelve (12) days later (on September 24, 2013) Mayor Maxwell signed the Contract that clearly specified new Hersey water meters and which makes absolutely no mention of Sensus meters or equipment. Thereafter, on October 11, 2013, Siemens itself signed this Contract specifying Hersey meters, not Sensus meters. Consequently, you are requested to provide the identities of all persons present when Mayor Maxwell allegedly directed Siemens to purchase Sensus meters, instead of the Hersey water meters specified by the Contract, and to give the date, time and place where such a direction was given, and to provide the City with copies of any and all documentation of such a direction to purchase Sensus meters. You are requested to provide this

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information within the next five (5) business days.

Then your response letter states that Siemens made “minutes” of a project kickoff meeting in January, 2014, where it reiterated that Sensus meters (as opposed to the Hersey meters specified by the Contract) would be installed, and a copy of those “minutes” mentioning the Sensus meters was provided with your letter. You then state that the “City never corrected Siemens’ minutes of that meeting, despite express invitation to do so as may have been warranted.” The City officials involved state that no such discussion was had about substituting Sensus meters for the Hersey meters specified in the Contract at a January meeting between City officials and Siemens representatives. We did have City officials search their e-mail for any transmittal of the Siemens prepared “minutes”, and after looking through about a hundred e-mails they discovered an e-mail that sent those “minutes” to them, but were shocked to see a very brief and cryptic reference to a “Sensus” drive-by system to be implemented way down in the “minutes” as no discussion about that had occurred at the meeting, nor did the cover e-mail (by which the minutes were sent) explain to them that they were under some obligation to correct the “minutes” taken by Siemens’ man or be stuck with them. A copy of that e-mail is attached. We do, therefore, request that Siemens’ man, Cory Carter, submit to a polygraph test by the Arkansas State Police relative to the discussion had at the meeting and his preparation of the “minutes” to which you refer in your letter. We will produce City officials Andrea Chambers, L.M. Wood, and David Knight for a like polygraph examination. Please advise within the next five (5) business days whether Mr. Carter will voluntarily submit to polygraph examination by the Arkansas State Police.

As you can see from the above, we remain troubled that Siemens would change the type/brand of the literally thousands of new water meters to be installed without obtaining a written and signed Change Order from the City. That is what paragraph 7.2 of the Contract expressly requires.

**Siemens’ Failure to Provide Legally Required Contractor Performance and Payment Bonds.**

We see where you assert in your letter that the copy of the Payment/Performance Bond attached to your response letter “was provided to the City contemporaneously with the Bond’s issuance in November, 2013.”

The problem here is that the official records of the City do not contain the original (or even a copy) of any Performance/Payment Bond, and City officials inform us that they have not seen such a Bond before us showing them the copy of the Bond attached to your letter. We do, therefore, request that Siemens provide the City with copies of any and all transmittal letters/memos/e-mails/etc. reflecting the delivery of the original Performance/Payment Bond to the City and, if none,

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that Siemens inform the City of the identity of the person who says he/she delivered the original of the Bond to the City, the identity of the City official to whom the Bond was delivered, and the date, time and place where delivery of the Bond was made to a City official.

Further, given the large (over \$10 Million) size of the project, and the mysterious absence of the Bond in the City's official records, demand is hereby made to Siemens to deliver an original of the legally required Performance/Payment Bond to the City within the next five (5) business days.

**Siemens' Failure to Provide Manufacturer Warranties on New Waters Meters, Etc.**

Your response letter says that Siemens does not have to provide the Manufacturer Warranties on the over 4,300 new water meters because "installation is not yet complete, and because the "City has not accepted the installation of the meters", and provides an example warranty statement that may be issued later on.

While we appreciate being provided with an example of a warranty that might be issued to the City later on, the City remains concerned about not having actually issued Manufacturer Warranties in hand on the several thousand water meters that have been installed and which have been in operation for some time now. The City is, after all, responsible for compliance with warranty conditions and requirements in order to be able to enforce those warranties against the manufacturer. You are, therefore, requested to point us to the provision of the Contract or other thing upon which you rely for Siemens delaying delivery of the actually issued Manufacturer Warranties until all installation of all meters is completed and accepted by the City. We request that information be provided within the next five (5) business days. You need to keep in mind here that the only warranties the City has on these literally thousands of water meters installed and operating in the City right now is that which is provided by the Manufacturer as Siemens has disclaimed making any warranties itself on those water meters in its Contract with the City as noted and documented by our letter to Siemens of October 22, 2014.

**Siemens' Failure to Provide Manufacturer Recommendations/Instructions on New Water Meters, Etc.**

Again you assert in behalf of Siemens that it is in some way excused from providing the Manufacturer Recommendations/Instructions on the thousands of new water meters that have already been installed and which have been operating in the City for some months now. The excuse offered by Siemens is that the "project has not yet been accepted by the City." If Siemens will provide the

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City with its written and signed commitment that the City will not be held responsible for loss of promised efficiency savings for noncompliance with Manufacturer Recommendations/Instructions respecting the new water meters pending “acceptance” of the installed meters, and will also provide its written and signed commitment that Siemens will cover any losses sustained by the City by reason of the City’s inability to pursue manufacturer warranties on the meters for noncompliance with Manufacturer Recommendations/Instructions, then the City would be in a position to favorably consider Siemens failure/refusal to provide the City with the Manufacturer Recommendations/Instructions on the meters. Siemens is requested to provide said written and signed commitments to the City within the next five (5) business days, failing which the City *again* makes demand on Siemens for delivery of actually issued (as opposed to an example such as provided with your letter) Manufacturer Recommendations/Instructions on the meters, and that same be provided within the next five (5) business days.

**City’s August 19, 2014, Letter to Siemens Requesting Explanations/Information.**

Here you suggest that the Siemens folks get together with the City folks and discuss the City’s concerns. We respectfully disagree. There are specific questions posed by the City’s letter to Siemens of August 19, 2014, that have gone unanswered for going on three (3) months. Those questions/concerns should be answered and addressed by Siemens in writing, and same is requested to be provided to the City within the next five (5) business days.

**Conclusion.**

As stated in our letter to Siemens of October 22, 2014, this is a very serious matter involving over \$10 Million in taxpayer funds. In addition to the legal issues addressed above, there are a number of reputable citizens of Monticello (including a member of the City Council) who have received water bills several times the amount of their historical water bills, and who have complained mightily relative to same. While some could be explained by water leaks on the customer side of the meter, we understand that the majority of the complaints arise from inaccurate water meter readings from the new Sensus meters. A listing is being compiled on that subject and will be provided to Siemens as soon as it is available. Further, the City is conducting a review of meters that were improperly installed, and a listing on that will also be forthcoming.

As we view this matter at this time, it is our opinion that each of the above discussed matters, particularly Siemens compliance with the requirements of Ark. Code Ann. § 14-164-402(15)(D) relative to Letter of Credit, etc., need to be resolved before the City proceeds further with Siemens on the project. As we see it, Siemens needs to come into compliance with applicable law and the terms of the Contract before the City will be under any obligation to proceed further with Siemens

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on the project, and that includes any obligation to do hydraulic studies (a thing which City officials understood would be done by Siemens). If Siemens will promptly and properly address those matters, then we believe that there will be a proper basis upon which the City may proceed further with Siemens on the project.

We would reiterate that copies of all correspondence (including e-mails) from Siemens to the City should be provided to our firm concurrent with the sending of same by Siemens to the City.

Sincerely,

GIBSON & KEITH, PLLC

By: \_\_\_\_\_



For The Firm

CCG/vk

cc: Mayor Joe Rogers  
Members of Monticello City Council  
City Attorney Whit Barton

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**From:** Carter, Cory [<mailto:cory.carter@siemens.com>]

**Sent:** Thursday, January 16, 2014 10:13 AM

**To:** Allen Maxwell ([montmayor@att.net](mailto:montmayor@att.net)); Andrea Chambers ([montcity@att.net](mailto:montcity@att.net)); ARDILLO Jr, Anthony; Marcus Hooker ([mhjr@hookerengineering.com](mailto:mhjr@hookerengineering.com)); Zach Tucker ([zack.tucker@monticelloar.org](mailto:zack.tucker@monticelloar.org))

**Cc:** Mott, Robert; [chad.davis@umswater.com](mailto:chad.davis@umswater.com)

**Subject:** Pre-Kickoff Meeting Minutes

All, I have attached the Pre-Kickoff Meeting Minutes.

Thanks,

**Cory Carter**  
**Project Manager**  
**Siemens Industry, Inc.**  
Cell: 601-946-0216  
Office: 601-718-1338  
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[cory.carter@siemens.com](mailto:cory.carter@siemens.com)

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