

Our ref: 25.1.201/KDR/6731
Your ref: INF CORR 5770

Bilfinger Berger-Siemens- CAF
Consortium

17 September 2010

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For the attention of Steven Bell – Project Tram Director

Dear Sirs,

**Edinburgh Tram Network Infraco
Infraco Contract: Alleged Remediable Termination Notice (Clauses 10.4 and 10.16 – Failure to
provide Extranet and Information in respect of Infraco Claims)**

We refer to your letter dated 9 August 2010 (INF CORR 5770) which purports to enclose a Remediable Termination Notice in relation to matters associated with Infraco's obligations under Clauses 10.4 and 10.16 of the Infraco Contract.

As at the date of writing you have served Remediable Termination Notices in respect of another 4 matters. None of these matters have been the subject of referrals to dispute resolution. It appears to us that tie has abandoned the contractual mechanism for resolution of disputes. This may be because every major issue of principle has been decided against tie in adjudication. However that is no justification for now abusing the termination provisions of the contract. It is clear that tie is now pursuing a policy of serving a Remediable Termination Notice in respect of each and every grievance it may have, regardless of the significance of each grievance and its implications for the Infraco Works. Whilst we will respond to each Remediable Termination Notice in turn, we object to tie's adoption of this policy.

We summarise our response to the Notice as follows:

1. The Notice does not identify a breach of Clause 10.16.
2. The breach of Clause 10.4 was acknowledged by Infraco in its letter of 11 August 2010 (ETN(BSC)TIE\$Q&ABC#051085).
3. The alleged breach or breaches of Clause 10.16 and 10.4 do not materially and adversely affect the carrying out and/or completion of the Infraco Works.
4. The Notice does not therefore identify an Infraco Default (a).
5. Your letter does not therefore constitute a valid Remediable Termination Notice.
6. Any attempt to terminate the Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.

This is further explained as follows:

1. No Breach of Clause 10.16

The Notice alleges that Infraco has breached its obligation in Clause 10.16 to allow tie personnel access to Infraco's offices to inspect documentary records in relation to all claims. However, it fails to narrate any specific instances when Infraco has failed to provide tie personnel with such access, other than Infraco's failure to comply with the instruction contained in tie's letter of 13 July 2010 (INF CORR 5526).

tie have only requested access under Clause 10.16 once. Such access was specifically requested by tie for the first time on 26 March 2010 at the audit concerning INTCs 204, 205 and 212. In response to that request and in compliance with Infraco's obligations under Clause 10.16, tie personnel (your Robert Bell and David Carnegie) was provided with such access (at Lochside Avenue and in particular to the offices of our Martin Hutchinson and David Gough) that same day. No subsequent requests have been made under Clause 10.16.

Clause 10.16 does not permit tie to issue the instruction contained in your letter of 13 July 2010 (INF CORR 5526). As set out in the Notice the instruction in that letter *inter alia* required unlimited access to a Document Control Room and an orderly documentary record for any additional costs or expenses with no reference to a particular claim. These instructions went well beyond that which Infraco is required to provide by way of access to records in order to comply with its obligations under Clause 10.16. Accordingly, Infraco's failure to comply with such instruction is not a breach of Clause 10.16.

There having been no other requests from tie under Clause 10.16, there has been no breach of Clause 10.16.

2. Clause 10.4 – Failure to provide an Extranet

As stated in our letter of 11 August 2010 (ETN(BSC)TIESQ&ABC#051085), we acknowledge that Infraco is obliged to provide an Extranet under Clause 10.4.

As you are well aware discussions between tie and Infraco personnel have been taking place to progress the setting up of an appropriate Extranet site to include the "body of evidence" that has to be handed over on completion to tie. We will under separate cover request information from tie in order to set up and provide tie access to an Extranet.

3. Carrying out and/or Completion of the Infraco Works not materially and adversely affected

Neither of the alleged breaches identified by you in the Notices has materially or adversely affected the carrying out and/or completion of the Infraco Works.

No requests have been made under Clause 10.16 which Infraco has failed to comply with. In any event all information relating to Permitted Variations and other claims which Infraco is required to provide to you under the contract has been provided in accordance with the relevant provisions of the contract. The information which would have been made available through an Extranet has been provided to tie by alternative means.

There is not one specific instance where a failure to comply with either of these clauses has had any impact on the carrying out and/or completion of the Infraco Works, never mind a material and adverse affect.

You state in your letter that tie has failed to perform its duties in relation to the management of (and to deliver in accordance with) the contractual mechanisms under the Infraco Contract intended to deal with Permitted Variations and claims for additional time, costs and expenses. We would entirely agree with this statement. However, this failure has not been caused by Infraco's failure to provide access in accordance with Clause 10.16 or the lack of an Extranet site. On the contrary, it has been caused by tie's refusal to acknowledge Infraco's contractual rights and entitlements under the Infraco Contract, and award claims for time, costs and expenses accordingly.

This position has been unanimously supported by the third party Adjudicators who have all rejected your argument that tie are entitled to refuse to perform their duties under Clause 80 on the basis that the provision of certain information is a condition precedent to the performance of those duties. Lord Dervaird's recent decision on the operation of Clause 80.13 has confirmed tie's culpability in respect of any delay in the completion of the Infraco Works caused by the failure which you appear to accept in this Notice.

4. No Infraco Default (a)

It follows from the preceding paragraphs that the circumstances you narrate in your Notice do not meet the definition of "Infraco Default (a)" in the Infraco Contract Schedule Part 1, contrary to your assertion.

5. Letter INF CORR 5770 is not a valid Remediabile Termination Notice

As no Infraco Default has occurred, you have no right to serve any Remediabile Termination Notice as you have purported to do.

6. No right to Terminate

No grounds for termination can arise from this alleged Notice.

For the avoidance of doubt this letter does not nor is it intended to constitute a rectification plan. If and to the extent the Infraco considers it necessary or appropriate notwithstanding the views expressed in this letter such a plan will be sent under separate cover.

We invite you to withdraw your purported Notice served with letter INF CORR 5770.

POS
10/11/11

Yours faithfully,


M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

cc: R. Walker
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