

Our ref: **25.1.201/EKI/7258**
Your ref: **INF CORR 6515**

**Bilfinger Berger–Siemens– CAF
Consortium**

29 October 2010

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For the attention of Steven Bell – Tram Project Director

Dear Sirs,

**Edinburgh Tram Network Infraco
Infraco Contract – Project Carlisle**

We respond to your letter of 19 October 2010 (INF CORR 6515).

Infraco has not withdrawn from Project Carlisle. What was stated in our letter 25.1.201/EKI/7058 is that we are not interested in further meaningless discussions of Project Carlisle that include any participation of Infraco in the funding of the Project or without an acceptance of Infraco's proposed Scope and Programme. Lacking any acceptance by tie, or even any reasonable response to our Proposals, we do now believe the effort to achieve a Project Carlisle-type agreement has run its course. As such, we see no further need for a spokesman in this regard.

With regard to tie saying that Infraco is displaying "an opportunistic attitude towards the Contract terms", it is tie that has unilaterally determined to withhold payment to which Infraco is entitled, it is tie that has campaigned, and continues to campaign, to draw Infraco to the negotiating table by way of threats and intimidation and it is tie that wishes to re-write portions of the Infraco Contract – exclusively in its favour.

We respond to the numbered points within your referenced letter as follows:

1. It is untrue that no representative of tie has asked Infraco to donate to the cost of the Project; effectively to bear a share of the difference between us in the amounts for Project Carlisle. From your Chairman to our Executives, from your Chief Executive to our Senior Management, and from your representatives, Messrs. Rush and Molyneux, to our Project Management, the messages have been "Infraco must reduce its price by £45Mio to avoid termination", "Infraco has been overpaid and there must be a flow of money, circa £50Mio, from Infraco to tie if any mutually acceptable termination scenario is to come to fruition", "Infraco must reduce its price for the Project to remain viable", and "Infraco must lower its price or termination is the only alternative". Perhaps the actual language used differs, but the message has been consistently clear from tie that Infraco must donate in the region of £45Mio or face termination. To make any future discussions clear, there will be no donation whatsoever from Infraco.

2. We have no need to address your comments regarding Remediable Termination and Underperformance Notices; which you are issuing under the campaign you are running in parallel, and contrary to, the Project Carlisle initiative. These Notices are being responded to through separate correspondence. However, your interpretation/position on Adjudication results cannot go without correction.

There have been no opportunistic claims from Infraco. tie has put forth several attempts to substantially reduce payment to Infraco during the Adjudication process, most recently arguing for a £4.8Mio credit from Infraco with regard to the Depot Access Bridge. It would be correct for tie to state that Infraco did not recover its requested amount. However, the reduced award, £1.2Mio versus the £1.8Mio requested, does not take into account pre-Adjudication agreements and settlements. When correctly presented, this Adjudication outcome is a shortfall in expectation and recovery for Infraco of £600k, and for tie of £6Mio.

The scale of expectation at Adjudication clearly demonstrates it is tie that has sought to take advantage of the Dispute Resolution Process. tie has attempted to uphold spurious financial positions in respect of a number of Adjudications, albeit to differing scales; whereas Infraco differences between initial estimates and revised amounts put to Adjudication have been adjusted based on updated / new information. Other reductions are due to pre-adjudication settlements and agreements, and straight forward commercial compromise by Infraco to achieve settlement.

To illustrate the differences in perspective between the Parties on design management, you could not have selected a better issue than the retaining walls at Edinburgh Airport. Perhaps the writer has done this without first looking into the details of the history on this. tie must know very well that this section of the route has been subject to considerable change in scope and requirements since the time of the original SDS preliminary design submitted in June 2006, driven by a combination of the demise of EARL, signing of side agreements with third parties, final determination of the Limits Of Deviation (LoD), and changes in requirements from tie and TEL. Whilst lengthy, we will set out for your ease of reference, what transpired.

Up to the point of Novation of the SDS Agreement into the Infraco Contract, May 2008, SDS was not required to secure approval from BAA for the SDS design. This responsibility rested with City of Edinburgh Council (CEC). At the point of Novation, new requirements were added for SDS to secure BAA approval, in spite of the fact that SDS had already issued the design for this portion of work, including culvert number 3, the tram stop at the airport, and the retaining walls utilizing the flood modelling prepared for EARL; which included the requirement for additional flood compensatory storage on New Ingliston Limited (NIL) lands. The conclusion of the modelling work undertaken was that the impact of the introduction of the Edinburgh Tram Network could be mitigated via the introduction of a weir in culvert number 3. As a result of this, tie reduced the LoD in advance of the signing of the NIL Agreement on 9 November 2005. Subsequently, the EARL project was cancelled.

After the point of Novation of the SDS Agreement, change orders were issued by tie for a kiosk and canopy to be introduced at the tram terminus at the airport on BAA lands, outwith the LoD. This resulted in a realignment of the retaining wall, introducing a protrusion (outwith the LoD) into the Gogarburn and reducing the overall channel width of the burn, and thus impacting on the flood characteristics and overall capacity of the Gogarburn. The requirement for SDS to accept responsibility for the hydrological modelling for the Gogarburn Retaining Walls and its associated flood plains was instructed by tie on 29 January 2009 (INF CORR 656). This included design of the kiosk, hydrological analysis, consultation with SEPA, and consultation with BAA.

Additionally, SDS received other change orders to the Gogarburn retaining walls, i.e. on 13 January 2009 for changes to the finish (INF CORR 583), and on 8 February 2009 for amendments to the west side near the BAA CCRC scheme for drainage and slope tie-in (INF CORR 465). Issues associated with these changes, and others, have held up (and are still holding up) the Prior Approval/Planning Permission for the area, and subsequently the final IFC of the end of the Gogarburn Retaining walls, which are outwith the LoD.

It is clear that the development of the SDS design to a satisfactory conclusion and issue of IFC drawings has been frustrated by long drawn out, on-going changes in tie requirements, additional third party approvals and tie delays in instructing the changes associated with the ongoing developments in the area. In saying that you have no cogent explanation on this shows that you have either not recognised the effects of your actions in this matter, or you are being disingenuous.

3. Without specific reference to what Section of Clause 6 you are referring to, we are limited in our response. However, with regard to your comments regarding "a constructive proposal" being brought to tie by our Mr. Walker we were expecting, on the contrary, to listen to what tie had to constructively propose. The record should indicate that the meeting was preceded by several conversations and telephone calls between Messrs Jeffrey and Walker, and was solely arranged to discuss mutually agreed termination. Prior to the meeting, it was clearly put forth by Mr. Walker that Infraco was expecting to be paid to mutually terminate the Project, but instead tie presented that substantial monies, possibly up to £50Mio would be needed to flow from Infraco to tie to recompense tie. This was in spite of our Dr. Keysberg clearly advising Mr. Jeffrey, in a telephone call just prior to the meeting, that Mr. Walker was empowered to speak on behalf of Infraco in this regard, and stating that there would be no donation to the Project by Infraco.

We hardly see how CAF's attendance at the meeting to receive such a demand would have been beneficial. To clarify, CAF has not expressed any desire to "further the ideas which emerged" during the meeting of 30 September 2010, specifically their interest in completing the Infraco Work beyond Haymarket.

Furthermore, to correct the record, it is tie that first suggested that Bilfinger Berger terminate its work at Haymarket under Project Carlisle, not Infraco, due to CEC's desire "not to have Bilfinger Berger in Edinburgh Streets".

4. The "impasse" we refer to is Infraco will not agree to reduce its price, tie's non-payment of Preliminaries to which Infraco is entitled, tie's non payment of £3Mio for the demonstrable costs on Princes Street to which Infraco is entitled, tie's non payment of other parts of agreed changes or Clause 80.15 instructed works to which Infraco is entitled, tie's constant threat to Infraco of termination and tie's general failure to act in a fair and reasonable manner in administering the Contract. Clearly tie has difficulty accepting the entitlements arising for Infraco therefrom.

Each month tie continues to prevaricate and to not accept our Project Carlisle Proposal, the cost of the Project increases, making the gap between available funding and the cost to complete even greater, further complicating negotiations, and further delaying an eventual operating tram service in Edinburgh. This is contrary to your frequent reference to your protecting the public purse and your Best Value obligations. In this regard, it is our opinion that tie is failing to fulfil obligations to the City of Edinburgh.

Notwithstanding the above, we believe a meaningful and responsible proposal from tie shall include agreement to the comprehensive Scope and Programme as we have put forth in both of our Proposals, agreement with the Infraco pricing (to be amended in relation to a revised programme), and a responsible means to address the scope of work beyond Haymarket and materials and trams procured specifically for the Project.

Yours faithfully,


M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

cc: David Darcy
Gordon Wakeford
Jesus Esnaola
Richard Walker
Michael Flynn
Antonio Campos