



For The Attention of Martin Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium
9 Lochside Avenue
Edinburgh
EH12 9DJ

Our Ref: INF CORR 6515/SB

Date: 19th October 2010

Dear Sirs,

Edinburgh Tram Network - Infraco

We refer to the Infraco's letter dated 14 October 2010 (reference 25.1.201/EKI/7058) which is designated by you as being in the matter of Project Carlisle. In recognition of the terms of that letter and our comments below we seek written confirmation from each of the three Infraco Members that they have withdrawn from the initiative referred to as Project Carlisle. If they intend to seek a compromise through that route we require confirmation that Mr. Kitzman is still the spokesperson for all Infraco Members.

We regret to have to say that your letter displays an opportunistic attitude towards the Contract terms and that it contradicts what you assert elsewhere. The assertions made by you rely on contrived and imaginary scenarios and show a careless attitude towards your own failures.

- 1 The last sentence of the third paragraph is without meaning or foundation. We deny that any tie representative has explicitly or implicitly asserted that any dealings with the Infraco have been, or are, with the intention of asking, seeking, or insisting that the Infraco donates to tie's cost of the project.

Project Carlisle is a without prejudice initiative, entered into willingly by both parties, which would de facto settle all claims for additional payment and extension of time the Infraco may have. The essential purpose of Project Carlisle is to create cost certainty. Such purpose does not arise from "budgetary shortfall". It is inter alia to enable tie and its stakeholders to budget for the delivery of the Project Vision.

We do agree that tie was afforded a certain amount of "open-book" access to Bilfinger Berger's sub-contract prices. However, the record shows that despite the efforts of Mr. Kitzman, the Infraco Members have not provided any further substantiated explanation of their various offers. To the contrary, as we confirmed in our letter dated 6 October 2010 (reference INF. CORR. 6370), the Infraco's representatives have indicated reductions in your offered costs.

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- 2 In the same paragraph you refer to an “*apparent condition precedent that Infraco must donate £45 million to the Project or face termination*”.

We take it that your reference to an “*apparent condition precedent*” is looking for us to confirm it – we do not. It is your behaviour that causes us to issue Remediable Termination and Under Performance Warning Notices. You are entitled to decide how you propose to rectify your breaches of contract. You may consider that entering into a compromise agreement, which may be Project Carlisle, may be adequate rectification. It is for the Infraco to propose and for **tie** to respond.

Your comments are at odds with your claim that adjudication results, which have substantially (in excess of 50%) reduced your Estimates under Clause 80.4.10, are a victory for the Infraco. The public (in whose interest we act) will not see those results as requiring you to donate towards **tie**'s costs – we rather believe that they will see them as putting right the Infraco members' opportunistic claims. Such behaviour by Infraco Members could not be credibly claimed to be in accordance with Clause 6, or for that matter, Clause 118.

We make no apology for issuing Remediable Termination Notices and Underperformance Warning Notices. The one your letter refers to adequately demonstrates why they are necessary – at this very late stage in the project you are still unable to deliver IFC drawings for the retaining walls which are required to terminate the ETN at the Airport. These works are totally unaffected by utility diversions and in the absence of any cogent explanation from you we believe to be completely caused by your failure to manage the design.

- 3 We agree that any proposal to compromise has to be meaningful (that is have a significant purpose) for it to be acceptable. Whilst you may not like the purposes and significance of the terms and scope of Project Carlisle, you cannot truthfully deny that they have not been explained to you, or that our representatives have, at all levels, been consistent in articulating them.

They are also consistent with our responsibilities, duties and functions. In seeking to meet them **tie** has acted in accordance with Clause 6. Moreover, any alternative you may propose will have to meet the purposes and significant responsibilities **tie** holds to its stakeholders and in Law without requiring either party to breach the terms of Clause 6.

In contrast the counter proposals you made on 11th September and 1st October 2010 do not address or recognise the purpose and essential requirements for compromise, whether it is called Project Carlisle or something else. At Mr Walker's request, under explanation that all three Infraco Members had a constructive proposal to make, a meeting was arranged between all three Infraco Members and our Mr Jeffrey on 11th October 2010. In the event only representatives of Bilfinger Berger and Siemens attended. They had no constructive proposal to make and without a representative from CAF present there was no prospect of taking further the ideas which emerged from a meeting with them on 30th September 2010.

However, Mr Jeffrey was able to make it clear that we are concerned that the Infraco is unable to deliver an integrated design. Mr Walker and Mr Flynn were asked to report back on this. The retention of your obligation to manage the delivery of the Design is one of the essential requirements of any compromise.

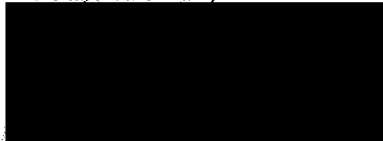
There is no foundation for you to say that the essential requirements are unreasonable.

On the contrary you give no reasoned explanation why the Infraco Members should insist that the Infraco Works are truncated at Haymarket. This being in any case physically impossible because of the work (albeit defective) you have carried out on Princes Street. As you are aware, to incorporate it into a working tram system requires a cross-over in St Andrew Square or York Place.

- 4 We note that you remain at our *"full disposition (sic) for a continuing dialogue in accordance with Clause 6 of the Infraco Contract, in order to seek alternatives to the impasse which exists between the parties"*.

You do not specify what you refer to as an "impasse". The only matter we can see as having reached a position where you can say that no progress can be made is Project Carlisle. We do not agree that given Infraco Members act in accordance with principles of Clause 6 progress cannot be made to that initiative. But whatever you may propose, the terms of the Infraco Contract will have to take their course until there is an agreement to the contrary.

Yours faithfully



Steven Bell
Project Director – Edinburgh Tram