

Dear Sirs,

**In the matter of Infraco's proposals to revise the Contract terms.**

**Introduction**

This letter refers to the Infraco letters listed in the following tracker schedule:

|           | <b>Infraco letter</b> | <b>Date</b> | <b>Source</b> | <b>Subject</b> | <b>Response to tie</b> |
|-----------|-----------------------|-------------|---------------|----------------|------------------------|
| <b>1</b>  | No reference          | 5 March     | K Reid        | Proposal       | None                   |
| <b>2</b>  | 03032010              | 3 March     | Infraco Board | Proposal       | None                   |
| <b>3</b>  | 03032010.1            | 3 March     | Infraco Board | Response       | 4262                   |
| <b>4</b>  | 4389                  | 1 March     | BSC Site      | New            |                        |
| <b>5</b>  | 4834                  | 1 March     | BSC Site      | Response       | 4069                   |
| <b>6</b>  | 4835                  | 1 March     | BSC Site      | Response       | 4835                   |
| <b>7</b>  | 4836                  | 1 March     | BSC Site      | Response       | 4032                   |
| <b>8</b>  | 4837                  | 1 March     | BSC Site      | Response       | 4112                   |
| <b>9</b>  | 4843                  | 1 March     | BSC Site      | Response       | 4143                   |
| <b>10</b> | 4888                  | 3 March     | BSC Site      | Proposal       | None                   |

The same or similar matters are referred to in the various Infraco letters and we confirm that we have attributed a hierarchy to the source of the correspondence. As Mr. Reid (letter 1) asserts that he speaks for Infraco Members we give his letter precedence over all others where there is a conflict or ambiguity. (He also indicated to our Chairman that he was sufficiently aware of the contents of the letters we refer to.) We then place in priority the letters written by Mr. Walker on behalf of the Infraco Executive Board (letters 2 and 3) with letter 2 having priority over letter 3.

In this letter we shall deal with the generality of the matters raised by Mr. Reid, as it appears to be the authoritative explanation of Infraco's stance on the issues raised in the other letters. However, you should note that we are preparing detailed responses to those other letters. Moreover, we would explain that we consider that those letters contain what may be conveniently referred to as your "heads of claim". We intend to treat them as such and our response will contain what may be referred to as our "counterclaim", including acceptance, if any, of what you assert (where we can agree) or rebuttal (where we cannot). We will also highlight failures on your part in so far as we think it relevant at this time. This will take some time.

We note that some of the letters from "BSC Site" contain intemperate and inflammatory language as well as accusations (which are denied) against **tie** and in some cases individuals. We invite you to reconsider these letters and, if you wish, to either withdraw the offending letters or revise them.

Although the letter from Mr. Reid is addressed to our Chairman we are replying in accordance with the protocol established by Mr. Reid in the first paragraph of his letter dated 12 January 2010. It is admitted that Mr. Reid and our Chairman met for an informal discussion on 5 March 2010. Otherwise it is denied that the matters referred to by Mr. Reid were discussed or agreed.

We confirm that Mr. Reid made a proposal to our Chairman that a small number of key differences be put to determination by independent experts. We are considering this proposal and will revert to you shortly.

Mr. Reid's letter has been copied by us to our Board and to Stakeholders and it was considered when the Board met on 10 March 2010. The following response reflects the explanation given to our Board and their conclusions:

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| 1   | <b>Paragraph 5</b>  |
| 1.1 | It is denied that the Infraco Contract is <i>"of a form which is based upon the assumption that (at the time of signing) the design would have been substantially completed"</i> . Explained that the terms of the Infraco Contract provide for "design development" Moreover, Infraco carried out design due-diligence and should thereby have been more aware than <b>tie</b> of the scope of design development necessary to meet the Employer's Requirements and Infraco's Requirements at the Date of Agreement.   |
| 1.2 | It is denied that the Infraco Contract is based on <i>"defined timing for site access and completion and would run as expected."</i> Explained that pursuant to Clause [ ] the Infraco Contract had defined Sectional Completion Dates and pursuant to Clause [ ] such dates could be extended. Moreover, it is explained that Infraco have failed to update the Programme as required by [ ] and give required notices and substantiation for extension of time for delayed possession of designated working areas. Confirmed that <b>tie</b> have granted a 7.6 weeks extension and offered a further extension of 9 months based on its own assessment. Not known and not admitted what Infraco's position is on the said offer. |
| 1.3 | Admitted that the Infraco Contract price is subject to variation under instruction by way of <b>tie</b> changes pursuant to Clause 80 and loss and expense pursuant to Clause [ ]. Denied that Schedule Part 4 is a mechanism for variation under explanation that it confirms Infraco's "pricing assumptions" and is to be referred to in evaluating any additional payment due to Infraco. Further explained that there is common agreement between <b>tie</b> , adjudicators and experts acting for Infraco that something has "gone wrong" with the drafting of Schedule Part 4, in particular Assumption 1.  |
| 1.4 | Admitted that Infraco have asserted that there have been in excess of 500 changes and that each alleged change has to be considered on its merits. Also admitted that the number of alleged changes are greater than <b>tie</b> expected, but denied that they admit all alleged changes are bona-fide changes. Moreover, explained that many alleged changes are of a minor value. (See attached schedules)  |
| 1.5 | Averred that in the hypothesis that Infraco are correct in asserting that valuing and agreeing the alleged changes is a problem; pursuant to Clause [ ] they have an obligation to co-operate, pursuant to Clause [ ] they have an obligation to act on an open book basis. Explained that Infraco have refused to provide its pricing note (see letter [ ]) and that the provision of such notes may assist in the process of agreeing change and preventing double payment in accordance with Clause [ ].   |
| 1.6 | Admitted that utility diversions have been delayed, explained that <b>tie</b> has kept Infraco regularly informed of progress of utility diversions. Asserted that <i>"we have no clear</i>   |

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|     | <p><i>certainty</i>” is a pejorative statement. Infraco is an experienced contractor in city transport infrastructure contracts and should therefore be aware of the unforeseen difficulties which arise.</p>   |
| 1.7 | <p>Noted what is asserted about the process of agreeing changes. However, Mr Reid makes no suggestion as to what may be done to rectify it. Further explained that Infraco are refusing to carry out work which they allege to have changed until the additional payment is agreed and a tie change order issued in the absence of full Estimates.</p>  |
| 1.8 | <p>Infraco's position is that clause 80.13 should be read in such a way as to mean that tie are only entitled to direct Infraco to proceed with work in the specific circumstances set out in clause 80.15, and that they are not entitled to "otherwise direct" where an Estimate has not been referred to DRP – and by extension, that tie are not entitled to issue such a direction either where there is a dispute about the existence of a Notified Departure or Infraco have failed to produce an Estimate.</p> <p>Whereas tie argues that the entitlement to "otherwise direct" does arise independently of clause 80.15 – and that this entitlement will arise in situations where it is accepted that there has been a tie Notice of Change. This argument is supported by the following:</p> <p>Infraco's interpretation gives no meaning to the words "<i>unless otherwise directed by tie</i>". It would be enough for the clause to read "<i>subject to Clause 80.15, for the avoidance of doubt, the Infraco shall not commence work in respect of a tie Change until instructed through receipt of a tie Change Order</i>", as the opening words of the sentence would be sufficient to enable the clause 80.15 exception to stand.</p> <p>The words "<i>subject to clause 80.15</i>" at the opening of the relevant paragraph should be interpreted as meaning "<i>unless prohibited, or contradicted, by clause 80.15</i>". Infraco's interpretation gives no meaning to these words.</p> <p>Infraco's interpretation does not make sense in the context of the words "<i>until instructed through receipt of a tie Change Order</i>." The 80.15 mechanism envisages tie issuing a tie Change Order in any event. It does not refer to some "lesser" instruction in the form of a "direction", and there would be no need to use the words "<i>unless otherwise directed by tie</i>" if all that was intended was that Infraco should proceed on the basis of tie Change Orders.</p> <p>It does not make commercial sense for Infraco to be entitled to frustrate the progress of the work where the only debate is about who will bear the ultimate cost of the work in question, and there is no controversy about the nature or scope of the work. tie's interpretation would enable work to proceed, but still protect Infraco's entitlement to make recovery for it in the event that it transpires that tie should be responsible for its cost and time consequences.</p> |
| 1.9 | <p>Clause 34.1 entitles tie to issue instructions to Infraco (with which Infraco must comply) as long as those instructions do not conflict with any other provisions of the contract:</p> <p><i>"The Infraco shall construct and complete the Infraco Works in strict accordance with this Agreement and shall comply with and adhere strictly to tie and tie's Representative's instructions on any matter connected therewith (whether mentioned in this Agreement or not) provided that such instructions are given in accordance with the terms of this Agreement and will not cause Infraco to be in breach of this Agreement."</i></p>   |

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| 2   | <b>Continue as present</b>  |
| 2.1 | Agreed that the Infraco Contract includes a Dispute Resolution Process and “ <i>the existing contract can be followed and will in the end produce the required completed tram system</i> ”.   |
| 2.2 | The assertion “ <i>this process might not give an outcome that is either the quickest delivery or optimal overall cost</i> ” is speculation and has no factual foundation or explanation. Averred by <b>tie</b> that Infraco has an obligation to achieve an outcome which could be described as being the quickest delivery and optimal overall cost for <b>tie</b> .  |
| 2.3 | Explained that the content of the alleged changes is not the reason for delay. The delay is in part caused by late delivery of IFC’s by the SDS Provider. Explained that Infraco has a duty of care to manage the delivery of such information in accordance with the Programme. Further explained that it is Infraco’s refusal to carry out alleged changed works prior to agreement of price which also causes of delay. Further explained that Infraco have not seen fit to either give details of delays caused by alleged changes or sought extension of time or make extension of time a pre-condition to carrying out the changed work.  |
| 3   | <b>Mutual Agreement to Amend the Existing Contract.</b>   |
| 3.1 | Denied that the works to Princes Street were executed under a collaborative approach, or that the approach is regarded by <b>tie</b> as being successful. Admitted that the works to Princes Street were “ <i>schedule critical</i> ”, but denied that they were anymore complex than an experienced contractor could have anticipated. Explained that <b>tie</b> consider that they had to accept the arrangement negotiated for Princes Street under duress to meet the critical dates. Admitted that Infraco have presented what is referred to as an On-street Supplemental Agreement and that <b>tie</b> has rejected the offer. <u>Quoad ultra</u> denied.  |
| 3.2 | It is explained that <b>tie</b> rejects the argument that the On-street Works merit an amendment to the existing contract. They believe that Clause 65 forms a sound basis on which the parties can work in mutual cooperation to achieve an outcome which achieves the quickest delivery (earliest completion ) and optimal overall cost (best value). Further explained that this approach was outlined at a meeting between senior <b>tie</b> representatives and Infraco Executive Board Members on the 2 March 2010 and that those Infraco Representatives showed no interest in discussing it. Moreover this approach would provide an “open book” approach to the costing and provide working flexibility. |
| 4   | <b>De-phase the existing programme</b>  |
| 4.1 | Noted that Infraco present proposals to re-sequence phasing if in the future they come under “budgetary pressure” which is conditional on <b>tie</b> agreeing to certain payments for alleged changes. Said proposals are unacceptable to <b>tie</b> .  |
| 5   | <b>Suspend the existing contract</b>  |
| 5.1 | Noted that this proposal by Infraco is “ <i>until there is full clarity on exactly when the</i>   |

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|     | <i>utility diversions will be finished – by which time the outstanding changes should also have been finalised”</i> Explained that current progress on utility diversions is “on programme” for substantial completion by mid 2010.   |
| 5.2 | It is not clear whether Infraco are proposing to suspend the whole the Infraco Contract Works or just the On-street Works   |
| 5.3 | Explained that Infraco draft revision 3 of the Programme is forecasting completion of On-street Works in October 2013, whereas tie believe that by adopting the approach referred to above, based on current known circumstances, they could be completed at or around June 2012. Whichever forecast date is considered, this is inconsistent with the proposition that it is necessary to have utility diversions complete before works to complete the On-street Works can carry on – moreover this was not the intention of Programme Rev 1. |
| 5.4 | The claim by Mr. Reid in paragraph 5 that agreement of changes has a detrimental effect on progress is inconsistent with asserting that they could be finalised within a few months, even if by “finalised” it is meant additional cost agreed, which is denied.  |
| 5.5 | It is not tie’s belief that this option is in the project’s best interests. Not known and not admitted whether Infraco’s “commercial position” is the same as Infraco’s “commercial rights”.  |
| 6   | <b>Mutual interest to terminate (or partially terminate) the existing contract.</b>   |
| 6.1 | It is explained that a contract cannot be partially terminated. It can only be terminated in full and the Infraco Contract contains relevant provisions under Clauses 88 – 95. Said clauses set out the manner in which termination can be executed and the consequential action and redress thereafter.  |
| 6.2 | It is explained that if tie desired to remove all of the remaining or part of the Infraco Works from the Infraco Contract they would be able to under Clause 80. In which case, subject to the reason not being an Infraco Default and Infraco fully complying with the requirements of Clause 80, Infraco Members rights are protected in accordance with the terms of Clause 80. Denied that Infraco members could object in so far as prevent such action by tie under the terms of the Infraco Contract.                                    |
| 7   | <b>Paragraph 12</b>   |
| 7.1 | Mr. Reid’s personal preference is noted under explanation that he gives no reasoning for it.  |
| 8   | <b>Paragraph 13</b>   |
| 8.1 | Denied that the alleged changes in themselves have impacted on the progress of the works – see above.   |
| 8.2 | Admitted that there is a clear mechanism within the existing contract to deal with changes – see above.   |
| 8.3 | Not admitted that there is “no valid legal basis to support the existence of any material   |

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|       | <i>default.</i> ” Explained that <b>tie</b> will issue Infraco a written instruction, under separate cover, to proceed with the works with due care and expedition. Failure to comply with the instruction may lead to <b>tie</b> validly invoking the terms of Clause 90.1.2.  |
| 8.4   | Noted that Infraco refer to taking “ <i>direct legal action against tie</i> ”. Admitted that Infraco has the rights to defend its legal and contractual rights. Not known and not admitted that Infraco are “well prepared”. Explained that in the event that <b>tie</b> do have to invoke Clause 90.1.2 Infraco would have the opportunity to remedy the default. Moreover, if they dispute <b>tie</b> ’s averment of an Infraco Default they are obliged under Schedule Part 9 to have the Dispute settled by the Disputes Resolution Procedure.  |
| 8.5   | Noted that Infraco admit to having a policy to involve the media and explained that such a policy is in breach of the terms of Clause 101.  |
| 8.6   | Explained that <b>tie</b> is aware of the costs of defending or prosecuting legal actions.  |
| 8.7   | Noted that Infraco are prepared to discuss with <b>tie</b> all the various options and explained that <b>tie</b> look forward to discussing the option proposed by <b>tie</b> in paragraph 3.2 above, under explanation that <b>tie</b> have commissioned the formulation of the structure of this option which requires no alteration to the Infraco Contract Terms.   |
| 8.7.1 | <p>The proposal commissioned will be consistent with the terms of Clause 65 and <u>inter alia</u> include draft heads of terms instigated by <b>tie</b> and, if possible, agreed with Infraco. In addition the proposal will respond and consider any alternative proposal made by Infraco.</p> <p>Earliest completion will be of essence to such proposal and, if possible, will be subject to discussions and negotiations between <b>tie</b>, including <b>tie</b> advisors, and Infraco.</p> <p>Any formula used for calculating compensation to Infraco will be predicated on such information as already been obtained by <b>tie</b> from Infraco.</p> <p>The proposal will recommend such entitlement to extension of time as may be reasonable. Moreover, it will ascertain and recommend any loss and expense Infraco may firstly be entitled to arising from delayed utility diversions; secondly to what extent such entitlement may be reduced for Infraco’s culpability elsewhere and in respect of delays caused by the poor performance of the SDS Provider.</p> |
| 8.8   | Explained that the benefits and burdens of invoking the termination provisions are intrinsic to those provisions.   |
| 8.9   | Noted that Infraco would seek to prevent <b>tie</b> from engaging third parties to complete the works. Explained that such action will be unnecessary if Infraco completes the Infraco Works with due expedition under the terms of the Infraco Contract.   |
| 9     | <b>Paragraphs 14 and 15</b>   |
| 9.1   | Provided that Infraco forthwith completes the Infraco Works with due expedition and in accordance with the terms of the Infraco Contract there is no need to discuss alternative solutions. Infraco have been assured by <b>tie</b> that there is no intention or expectation that  |

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| Infraco will receive anything other than what they are entitled to under the Infraco Contract. There is no “solution” to be found – the contract terms provide the solution. |
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## Conclusions

Infraco present a confusing picture to tie.

The acceptance by Mr Reid that the existing contract can be followed is welcome. In letter 1 Infraco repeat proposals which tie have rejected on the basis that they are not compliant with the terms of the existing contract. Moreover the letter articulates new proposals – all with the purported intention of benefitting tie. However, any reasonable review of Infraco’s proposals leads to the conclusion that what is proposed is possible under the existing contract terms. There is no requirement for revision or deviation from those terms.

On face value letter 1 contains what can be described as “words of comfort” purporting to assure tie of Infraco’s wholehearted cooperation and goodwill. This message is contradicted by the tone of letters 4 to 10 inclusive. Moreover, the solicitous overtures do not sit well with the more “threatening” tone of paragraphs 13, 14 and 15 in letter 1.

It is difficult to decide what Infraco is seeking to achieve. Are they seeking to exit from the Infraco Contract because it has become too difficult, costly or troublesome for them to execute?

Infraco’s position that the contract price is subject to variations is confirmed by Mr. Reid – yet he expresses surprise that there are more than 500 variations. It is difficult to believe that contractors with the experience of Bilfinger Berger, Siemens and CAF have not experienced more than 500 variations on contracts of this size and, according to Infraco, complexity. Albeit in this case many of the alleged changes are of a minor value.

We assume that the solicitous overtures we refer to are intended to assure us that Infraco are ready, willing and able to complete the Infraco Works with due expedition and in a cooperative manner. If this is correct all they need to do, without prejudicing their “commercial rights” (maybe different to their “commercial position”) is:

- proceed with work which is subject to alleged change prior to the agreement of Estimates; and
- enter in a Clause 65 process to satisfy the effects of delayed utility diversions.

It was arranged between Mr. Reid and our Chairman that our Chairman would telephone Mr. Reid to pass on the conclusions reached by our Board on this matter. We confirm that this call will take place in the next few days – having given Mr. Reid time to consider this letter.

Yours faithfully,

Richard Jeffrey