Edinburgh Trams

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

Our Ref: INF CORR 4648

Date: 1st April 2010

Dear Sirs,

Edinburgh Tram Network – Infraco

Our letter INF CORR 4417 dated 12 March 2010 informed you that we would be giving you a more detailed response to the letters listed at the end of this letter. We now respond on the basis that letters 3 and 9 are central to Infraco's position. We do not refer to letter 1, other than to record that you have made no proposals to further your Mr. Reid's proposition to refer a number of key differences to independent experts for determination. However, we are pleased to note that you are considering your response to our proposals as set out by Mr. Jeffrey in his email on 23 March 2010:

- Referring the meaning of Schedule Part 4, especially clause 3.4.1.1, to a form of binding determination.
- Infraco to accept that it makes no commercial sense to refuse **tie**'s instruction given under Clause 80.13 on 19 March 2010.
- A joint and collaborative approach to using Clause 65 for future on-street works.
- Progressing Top 33 items proposed by Siemens for resolving the differences on the section between Edinburgh Park and the Airport.

We confirm our willingness to make rapid progress on these proposals and that we have appointed independent professional experts to assist with the third and have suggested the same to you for the fourth issue. We record our appreciation to Siemens for the initiative they have taken on the fourth proposal.

Overview

We do not attempt to reply to all of your assertions or averments and confirm that we take issue with and deny everything beyond that which we have explicitly accepted.

The letters we refer to substantially articulate and repeat the same issues or allude to the same assertions. It is unhelpful that there are numerous assertions which are couched in abusive and inflammatory language from which you draw very biased and unsustainable conclusions. You make unfounded assumptions about what you describe are "difficulties facing **tie** in administering the Infraco Contract" and in some cases you appear to be basing your actions on those assumptions.

You appear to seek to "hedge your bets". For example, in the penultimate paragraph of letter 3 you say that you aren't ignoring instructions under Clause 80, but add that "in so doing" (ignoring instructions) that you are not in breach of Clause 80 as you are in some way "forbidden" to act on our instruction to proceed with alleged changes prior to there being a finalised **tie** Change Order. This is disingenuous, all the more, because your refusal of instructions is discussed so often at meetings where we are pressing you to proceed with the works under those very instructions and confirming that it will not prejudice your rights to payment.

In this reply, we reflect the fact that the Infraco Contract is an entire agreement (Clause 106) which places on you general obligations and duties to act with care, in a cooperative manner and to perform. It also places specific duties on you:

- Pursuant to Clause 34.1 you are required to "adhere strictly" to **tie**'s instruction subject to such instructions not placing you in breach of the Agreement.

- Pursuant to various clauses, in particular Clause 65 and 80, it requires you to give competent and timely notices, provide Estimates and full details and to keep **tie** updated.

- Infraco is required to substantiate entitlement to extension of time, loss and expense and other relief and compensation. There is no obligation on **tie** to make assessments in the absence of substantiation by Infraco.

- Infraco is required to undertake the Works with due expedition.

- Infraco is required to mitigate, that is reduce the impact of any delay, loss or requirement for compensation.

- Infraco is required to revise and monitor the Programme on a regular basis to meet the Planned Completion Date.

We have repeatedly challenged your assertions that the project execution has become too complex for you to provide notices etc. on an alleged event by alleged event basis, but you have persisted with not doing so.

Under the circumstances, any reasonable person would not regard our response to the pre-condition you placed on starting On-street Works as being "inflammatory". Nor would that person consider us, as client with contractual rights, reminding you of Clause 90.1.2 as being inconsistent with a "professional organisation". Our words are intended to "warn" prudently and we can confirm that we have considered the potential results of an outcome where you continue to refuse to act on our instructions.

Without prejudice to our assertion that you have not complied with the terms of Clause 65 and that we refute your allegation that the extra-contractual award of 6 months loss and expense falls short of your entitlement, it is for you to substantiate further entitlement. It makes no commercial sense for you to refuse to progress the works whilst we have to wait on you to put forward that substantiation. Moreover, that refusal flies in the face of the understanding that such an award would be made in recognition of an undertaking by your Mr. Darcy in effect to progress efficiently with the Off-street Works.

Reply to Infraco claims as understood from the letters listed at the end of this letter

Preliminary Issues

1 **tie** has a clear obligation to comply with Best Value obligations. **tie** is a wholly owned subsidiary of a local authority which is the Authorised Undertaker pursuant to the Edinburgh Tram Acts 2006. **tie** has delegated authority to implement the works on behalf of the Authorised Undertaker which must comply with its statutory duties, which include those duties to achieve Best Value under the Local Government (Scotland) Act 2003. In that special delegated capacity, **tie** is required to comply with those same duties. Furthermore, as a wholly owned subsidiary of the City of Edinburgh Council, **tie** is required to ensure compliance with the principles of Best Value. Infraco is required to carry out the Infraco Works in compliance with the Edinburgh Tram Acts 2006 and is contractually responsible for indemnifying **tie** and the City of Edinburgh Council for any loss, liability, damage or forfeiture which is a result of the Infraco causing **tie** or City of Edinburgh Council to be in breach of law.

2 Infraco do have a contractual obligation to what can be described as "maximising productivity". Please see Clause 7.5.1. The term adequately describes the process of applying the requirements of Clause 60.9 and 61. "Acceleration" is defined by Clause 61.2. However, tie considers it to be a sterile debate as to what amounts to one or the other if the parties cooperate in applying the "mechanisms" prescribed by Clause 65.

3 **tie** confirm their invitation to Infraco to cooperate in a joint exercise in this respect. **tie** reconfirm their instruction to Infraco to proceed with the On-street works before such matters have been finally resolved under explanation that they have on an extra-contractual basis offered 9 months extension of time and six-months loss and expense. Moreover, on a without prejudice basis, **tie** are willing to reimburse Infraco's demonstrable additional costs before such compensation is agreed, subject to Infraco demonstrating to **tie** that the work is being executed by properly appointed and approved sub-contractors who priced on a competitive basis.

4 **tie** have offered to extend the Sectional Completion Dates by 9 months, tie's letter dated 13 November 2009 is referred to for the expectations and terms of that extra-contractual offer. It is noted that Infraco have indicated that they have only accepted that tie may make the offer, not that Infraco accept it. **tie** has not waived any of Infraco's obligations and Clause 109 is relied upon.

5 In the absence of any detailed claim for extension of time it is disingenuous to assert that **tie**'s letter of 13 November 2009 is "vague and containing no expressed wording". Moreover, the references to it being an "initial extension of time" and "further entitlement to be assessed" are not supportive of Infraco's proposition that Infraco could be denied any further entitlement for extension up to 13 November 2009. However, based on what information Infraco has provided to **tie** and the following assumptions **tie** are not convinced that the current Planned Sectional Completion dates are unachievable.

6 Infraco's refusal to accept that they have a clear obligation pursuant to Clause 80.13 and Clause 34.1 to progress with the works where the only outstanding debate is responsibility for additional costs makes no commercial sense and only frustrates the progress of the works. In so far has such delay is on the "critical path" Infraco will be responsible for its consequences.

7 Infraco are called upon to specify the notices they purport to have issued in accordance with Clause 65 and how tie have been in breach of Clause 65.2A1.1.

The Mechanics of Clause 65 and Compensation

8 **tie** do not accept that Infraco have provided interim notices (written particulars) in accordance with Clause 65.2.2 (b). **tie** letter INF CORR 4517 dated 24 March 2010 and letter INF CORR 4143 dated 19 February 2010 explain **tie**'s stated position in relation to Infraco's failures to comply with the terms of Clause 65. Furthermore **tie** confirm that such failure amounts to an Infraco Default (a) if it, as Infraco claims, is preventing Infraco from properly revising the Programme and thereby has the potential to materially and adversely affect Infraco's ability to carry out and complete the Infraco Works.

9 **tie** do not accept that Infraco have complied with the requirements to give notices pursuant to Clause 65.2 and state that when applicable Infraco have not issued statements in accordance with Clause 65.2.2 (a) and updated these on an interim basis in accordance with Clause 65.2.2 (b). Moreover Infraco have not demonstrated to the reasonable satisfaction of tie that Infraco and the Infraco Parties could not reasonably have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken; the alleged Compensation Event is the direct cause of the delay, inability to perform and/or the additional costs; and the Infraco is using reasonable endeavours to perform its obligations under this Infraco Contract.

10 Infraco are obliged to comply with "the mechanics" of Clause 65. It is further explained that tie admit that certain delays to utility diversions are a Compensation Event (b), as defined in Schedule Part 1 and that tie have, without proper substantiation from Infraco, offered, to extend the periods for Sectional Completion by 9 months. It is not known and not admitted what Infraco's response is to the said extension of time.

tie has invited Infraco to engage on processing the "mechanics" of Clause 65 in a joint and cooperative manner. Such process is to recognise the requirements prescribed by the Infraco Contract to work in a mutually cooperative way on an open book basis which results in obtaining best value for tie; does not place tie is breach of its obligations in Law and contract; and does not provide Infraco with "double recovery".

11 It is recognised that Schedule Part 4, paragraph 3.5 and Pricing Assumption 24 and 25 de facto clarifies what is Infraco's entitlement under Clause 65 for a Compensation Event (b) and explained that it makes commercial sense to deal with Infraco's entitlement to extension of time, loss and expense and other compensation through the "mechanics" of Clause 65.

12 Whilst the preamble to Clause 65.2 does not use the term "condition precedent" it is clear that "to obtain (such) extension of time and/or relief from performance and/or claim for such costs" the requirements of Clause 65.2.3 have to be met by Infraco to the reasonable satisfaction of tie. Moreover, pursuant to Clause 65.4 any delay in providing information over and above the dates given in Clause 65.2 (for whatever reason) will not be entitled to extension for such delay.

13 Having obtained (such) extension of time and/or relief from performance and/or claim for such costs and having fully complied with the requirements of Clause 65.2.2 pursuant to Clause 65.3.3 *"the Infraco shall be paid the amount of any direct and demonstrable additional cost as may be reasonable in the circumstances of the Compensation Event (as agreed by the Parties or determined pursuant to the Dispute Resolution Procedure) , such payment to be made through the operation of Clause 67 (Application for Milestone Payment) and in relation to that proportion of the amount to which the Infraco is entitled which relates to additional costs expended in earlier Reporting Periods, payment shall be included in the next Application for Milestone Payment following* ***tie****'s assessment in relation to the Infraco's entitlement to extension of time, additional costs and relief pursuant to Clause 65.2A1.2"*

14 Clause 65.3.3 explains how, what and when the Infraco shall be paid for additional costs arising from obtaining (tie's confirmation of entitlement after review under Clause 65.2A1) extension of time and/or relief from performance and/or claim for such costs.

15 **tie** note that Infraco admit that they have not provided the details and information required under Clause 65 explaining that it is "entirely meaningless without having a baseline (an agreed and realistic Programme reflecting where matters sit at present as a result of not only of the MUDFA delay, but also all other factors impacting on progress including the many INTC's issued with reference to Clause 80) against which to assess and monitor progress. " In so far as the Contract terms have been rendered meaningless or frustrated it has been caused by Infraco's failure to give details and explanations and to update the Programme as required by the Infraco Contract.

Programme matters

16 **tie** has not refused to properly engage in the process leading to them accepting a revised programme. Infraco have failed to comply with the terms relating to revising the Programme and that **tie** has accepted and rejected proposed revisions with good reason.

17 **tie** is not *"focusing its attentions on developing a whole gambit of spurious allegations and claims against (Infraco)".* Infraco are instructed to comply with **tie**'s letter INF CORR 4426 dated 15 March 2010 and either produce a programme which complies with current Planned Completion Dates or one which is supported by a proper and detailed evaluation of entitlement to extension of time.

18 **tie** deny that there is "doubt" as to when utility diversion works will be completed. Infraco have been kept regularly informed of the programmes submitted by other contractors engaged in carrying out such diversion work. It is recognised that those programmes have been delayed, but Infraco are required to update the Programme based on the information available at the time. It is trite for (and contractually incorrect of) Infraco to suggest that they can abandon their responsibilities to revise the Programme because the said diversions works have suffered delays.

19 **tie** is not ignoring any discussions or exchanges with Infraco. **tie's** letter INF CORR 4426 dated 15 March 2010 explains in detail why Infraco's latest proposed Programme is rejected by **tie**. Any difficulty Infraco have in monitoring and assessing the impact of various Compensation Events is of their own making. **tie** consider the current Planned Completion Date to be 30 June 2012.

20 It is a matter of fact that the dominant cause of delay has not been determined and it is for Infraco to demonstrate by reference to the "critical path" which delays are dominant. Noted that "concurrent delays" have to be considered in determining the "critical path" and that it is for Infraco to demonstrate, dominant, concurrent and critical delays. A simple statement to the alleged fact that it may be obvious is not sufficient contractually or at law. Infraco have not demonstrated their actual entitlement to extension of time and **tie** deny that the discussions on programme were intended (by agreement or otherwise) to make such demonstration, or to satisfy the requirements of Clause 65.

21 In the circumstances where Infraco issue INTCs which are later withdrawn or successfully refuted by tie and cause delay to the critical path, Infraco will be responsible for the consequences.

22 **tie** has not rejected any revised programme for reasons which cannot be justified. It is intrinsic to having a revised programme in terms of the Infraco Contract that it would be used for monitoring progress. **tie** have attempted to "work together" with Infraco, however it is otherwise denied that tie agreed to "prepare" the revised programme. **tie** has not waived any of Infraco's obligations under the Infraco Contract (see again Clause 109).

23 Infraco's assertion that they will only provide information relating to the consequences of an alleged Compensation Event when there is an accepted Programme on which a reliable estimate can be given is contradictory and, if right, would frustrate the progress of the works. A revised programme would have to include an estimate of the likely consequences of the alleged Compensation Event. It would of the essence for tie to accept the revised Programme; there is no explicit requirement to "agree".

24 It is for **tie** to decide whether an Estimate is "meaningful" in assessing and reviewing notices and information given by Infraco.

Performance of the SDS Provider and Design Management

25 We agree that many of the circumstances that have caused delay have been caused by late release of IFC design by the SDS provider. Infraco will have to show that such delays have not been caused by Infraco Design (i) not being submitted to the SDS Provider in accordance with the Consents Programme and Schedule Part 14 (*Review Procedure and Design Management Plan*); or (ii) being rejected by the Approvals Body on grounds of content or quality but not, for avoidance of doubt, on the grounds of design principle, scope, form or specification where such design meets the Employer's Requirements and the Infraco Proposals.

26 Contrary to what Infraco asserts, audits and inspections of the SDS Provider's performance do give rise to the need for any assessment of extension of time or compensation to take express account of whether Infraco have managed the SDS Provider, since Novation, with a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity.. Moreover, there is good reason to interrogate whether the time taken to obtain approvals results, directly from the way in which the SDS Provider has been managed by Infraco.

27 Whilst it may well be that some delay in issuing IFC's may not have caused further delay, the level of delay has certainly impacted on progress whether alleged changes are implemented before a **tie** Change order is issued or not. Infraco will have to show that they have managed the SDS Provider in a manner which is expected of a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity. Infraco will have to produce evidence that they have exercised skill, care and diligence in endeavouring to reduce the time and impact of such delays. No such evidence was produced at the recent audits.

28 Assuming that it warrants a tie Change Order, any delay arising from the change in work covered by an INTC arises either from the additional time required to carry out the additional works or the delay caused by the late release of IFC design by the SDS provider (see paragraph 7 above), or delay induced by Infraco by refusing to carry out the changed works until instructed through receipt of a **tie** Change Order.

Conclusion

- It is clear that **tie** do recognise that Infraco have an entitlement to extension of time and compensation and it is equally clearly common ground that Infraco have not complied with the requirements to provide details or Estimates pursuant to Clauses 65 and 80.

- It is clear that Infraco are refusing to proceed with alleged changes until **tie** issue a **tie** Change Order. **tie**'s position is that Infraco's reading of Clauses 80.13 and 80.15 is wrong and makes no commercial sense.

- It is clear that Infraco will be ignoring the provisions of Clause 34.1 if they continue to refuse to carry out **tie**'s instructions.

- It is clear that **tie** and Siemens have made constructive proposals on how to resolve key issues.

- It is clear that it is now for Infraco to agree to work in cooperation with **tie** to implement those proposals.

- It is clear and common ground that the SDS Provider has delivered IFC's later that required by Programme Revision 1 and that obtaining CEC Approvals has taken longer that it should have.

- It is clear that Infraco is responsible for managing the SDS Provider as part of Infraco's responsibility to produce competent design that complies with and delivers the Employer's Requirements.

- It is clear that the contract completion will be substantially delayed and that in the hypothesis that Infraco's interpretation of Clause 80 is correct (which **tie** deny) it would not be possible to determine a completion date.

In these circumstances **tie** refutes any allegation that its recent correspondence has been unnecessary or intended to divert attention and resources from the real matters at issue.

Rather it is a well measured and justified effort to draw the attention of Infraco and Infraco Members those issues and the consequences if Infraco does not start to act in a commercially sensible manner in accordance with the terms of the Infraco Contract. As you can see from CEC's letter to you dated 24 March 2010, CEC, as ultimate client, and owner of the ETN assets, are kept objectively informed through a team of advisers.

We trust that you will now constructively work with us in the manner outlined above and note that this letter is written without prejudice to any response we may make in the future to any detailed claim or action you may make or raise.

Yours faithfully,

[redacted]

Steven Bell
Edinburgh Tram Project - Project Director
for and on behalf of **tie** limited.

Letters referred to:

	Infraco letter	**Date-2010**	**Source**	**Subject**	**Response to tie**
1	No reference	5 March	K Reid	Proposal	None
2	03032010	3 March	Infraco Board	Proposal	None
3	03032010.1	3 March	Infraco Board	Response	4262
4	4389	1 March	BSC Site	New	None
5	4834	1 March	BSC Site	Response	4069
6	4835	1 March	BSC Site	Response	4835
7	4836	1 March	BSC Site	Response	4032
8	4837	1 March	BSC Site	Response	4112
9	4843	1 March	BSC Site	Response	4143
10	4888	3 March	BSC Site	Proposal	None