

Our ref: **25.1.201/KDR/4836**
Your ref: **INF CORR 4032**

1 March 2010

tie limited
CityPoint
65 Haymarket Terrace
Edinburgh
EH12 5HD

Bilfinger Berger Civil EO	
Date Sent	01 MAR 2010
File Number	
Action	
Distribution	

Bilfinger Berger-Siemens- CAF Consortium

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For the attention of Steven Bell - Tram Project Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Clause 80 Notices and Estimates and Best Value

We refer to your letter dated 19 February 2010 (ref. INF CORR 4032).

We address below the points you raise on an issue-by-issue basis. However we note that the focus of your current approach appears once again to be the Estimates. Your questions cover well rehearsed topics in relation to which we have made our position known. We are disappointed that your approach continues to divert attention and resources from the real matter at issue which is preventing progress on this project, that being tie's continued refusal to acknowledge that Notified Departures have occurred, in relation to which we have an entitlement to be reimbursed. This is the case even in the face of the decisions in the recent adjudications, decided very clearly in our favour.

We would also note that, even were your statistical analysis of our alleged failings in relation to Estimates correct (which we do not concede), then there is and can be no loss or consequence to tie in a situation where tie continually refuses to acknowledge that changes have occurred and that Infraco has any entitlement to additional compensation at all. In short, your approach of focusing on the mechanics of the Estimate procedure does nothing towards moving both parties forward to a conclusion on this matter. We would remind you that the Clause 80 procedure is intended to be collaborative. Your blanket denial that a change has occurred, refusal to discuss and agree issues with us (see Clause 80.9), and your statement now made that you will not acknowledge notices which are not in the form which you unilaterally request, does nothing to assist here.

We are further concerned that your letter contains statements which are factually incorrect and which must be known by you to be so. If this information and other such information is being conveyed to, or is otherwise coming to the attention of third parties, then it paints an entirely misleading picture of both the areas of dispute and our position vis-à-vis those disputed areas. This situation is clearly untenable and we shall be reviewing our position and our options accordingly.

In responding to the following points, where no specific response is given to an issue raised, this does not constitute agreement thereto. We reserve our right to respond to any such points at a later time. Your bullet points have been converted to letters for ease of reference.

- a) No comment
- b) No comment
- c) There is no requirement for a request for an extension to the period within which Estimates are to be issued, to be either explained or quantified. Notwithstanding this, tie is aware of the facts

surrounding the Change and can therefore adequately judge the necessity of an extension *per se*. It is a matter of fact that in many cases at the notification stage, insufficient information exists to reliably judge exactly how much time is required by way of an extension. We would remind you of tie's obligation to act reasonably in response to such a request (Clause 80.3). The vast majority of requests made for an extension of time have gone unanswered by tie.

- d) Due to our Change Register being a "living" document which is updated constantly we are unable to retrospectively "carve out" information post 22 January 2010 to assess your quoted figures.
- e) This statement is misleading since in only a handful of cases has tie agreed to an extension. Your view of "lateness" is an entirely subjective view based upon the erroneous assumption that any Estimate delivered beyond the time stated in Clause 80.3 is late. The provision of an Estimate is subject to several factors *inter alia* tie's acknowledgement that a Notified Departure has occurred, sufficient information being available to produce an Estimate, the volume of changes and to a certain extent their interactive nature e.g. where time is a factor. It also raises the question over the purpose of issuing an Estimate at all, in circumstances where tie have continually maintained the position that no Notified Departure has occurred.
- f) See item "e" above.
- g) See item "e" above. See also comments made by Alan Wilson in the Russell Road Retaining Wall adjudication. tie still has to address part or inadequate Estimates such that, even if Estimates were inadequate, which we do not believe they are, it is still incumbent upon tie *inter alia* acting reasonably, to deal with them.
- h) See item "e" above.
- i) Your analysis of the amounts by which the Estimates have altered is fatally flawed. Notwithstanding the comments in "e" above, as you well know the approach of processing the changes involves reviewing the technical aspects in which tie often changes the scope leading to reductions in the amounts to be claimed. In contrast to your analysis, our figures show the percentages to be 87% and not 60%, as you assert. We object to the assertion, albeit implied, that Infracore is in some way artificially inflating its Estimates. We have attached a "Comparison of BSC Estimates and tie Change Orders Issued" as at 9 February 2010 which details the 87% and how the figure is derived. [Note that this comparison was provided to tie on 17 February 2010 and clearly has not been considered prior to issuance of your letter INF CORR 4032]. We would advise extreme caution if and when passing inaccurate and misleading statistical information to any third parties, especially where such third parties rely on such information in whichever form.
- j) We strongly refute this allegation. Our letter dated 11 December 2008 (ref: 25.1.201/MRH/1134) was a genuine attempt to explain the process to you given your stance on wholesale rejection. It simply set out our position as the contract prescribes it, and how events and circumstances impact upon our ability to comply with the contract with respect to the provision of Estimates.
- k) This statement is misleading as we do not understand to which letter you refer.
- l) During the course of several meetings with your staff on the matter of "design changes", we have explained that these Estimates only cover the design element of the notified change and that a further "Construction" Estimate will be provided once the SDS Provider has issued the IFC

Drawings relating to each design change. An explanation has therefore been given. Further, see item "d" above in relation to the accuracy of the figures quoted by you.

Recent adjudications have conclusively supported our position on the matter of Notified Departures both in principle and on the ancillary matters e.g. the contract not being a fixed price lump sum. In terms of Clause 80, we are expressly precluded (not as you erroneously allege "*refusing to commence*") from progressing with works which are a tie Change without a tie Change Order or a clause 80.15 tie Change Order. We are not refusing to commence work as you allege but simply applying the terms of the contract as it should and must be applied. We cannot make our position on this any more clearly.

Moving to the numbered paragraphs of your letter:

1. Your statement is unclear. Please clarify your position. Works not subject to Clause 80 are progressing. For those works subject to Clause 80, it is only where a tie Change Order has been issued, or where a dispute is referred to the DRP, that tie can elect to instruct such works to commence. Your analysis fails to acknowledge the clear and unambiguous wording of Clause 80.13. Accordingly if we were to commence 'all work' in circumstances other than where a tie Change Order or Clause 80.15 tie Change Order has been issued, we would be in clear breach of contract. The prohibition on executing works subject to a tie Change under clause 80.13, was specifically designed (and insisted upon by tie) to give tie control over the change process, a principle clearly enshrined in the contract.
2. The difficulties faced with clause 80.4 have come about directly as a consequence of tie refusing to accept the substantive principles of entitlements to changes as provided for in Schedule Part 4, and further compounding this failure by failing to properly administer the contract. Whether or not clause 80.4 has become inoperable is a subjective matter although it is certainly cumbersome. As to the time at which the process became cumbersome, this again is a subjective matter and would be the subject of an analysis at such time as matters become static enough to render any such analysis feasible. As a matter of principle, the efficacy of clause 80.4, along with clause 80 in its entirety, is not in our opinion in doubt *per se*, but as with other clauses within the contract, it is subject to tie's desire and ability to administer the contract properly. If tie rejects a change and further fails or neglects to declare a dispute facilitating an instruction to commence, then it cannot complain later that delays have occurred when the matter has been adjudicated in Infraco's favour.
3. See point 2 above.
4. We are applying the clear terms of Clause 80.13 which prohibit us, save where an instruction is received via Clause 80.15, from proceeding with the work prior to the receipt of a tie Change Order. This could not be clearer. We cannot understand your continued refusal to acknowledge the express terms of the contract which were inserted for tie's benefit.
5. Paragraph 5 of your letter is of considerable concern to us. You are clearly attempting to retrospectively introduce additional requirements into the contract which we reject. We would remind you in particular of the conclusions reached by Mr Wilson in the Russell Road Retaining Wall adjudication (at paragraph 118) where it was stated:

"It seems to me as a starting point, that the Contract does not provide a quality standard for Estimates. If an Estimate falls below what is contractually or reasonably required then

the paying party can raise in defence that the Estimate failed to provide certain information and that as a result the entitlement is reduced or, for instance in the case of time, extinguished for lack of evidence. The paying party has available to it any arguments that it may seek to advance concerning a failure to mitigate or obtain competitive prices, if that is the case. However, I do not think it can reject an Estimate simply because it says it is badly executed. The Contract provides at Clause 80.10 that if the parties cannot agree 'on the contents of the Estimate' that it may be referred to the Dispute Resolution Procedure."

Thus it is not open to tie to simply ignore the contents of, or receipt of a notice. To do so would be in breach of the contract and will substantially frustrate and further delay the Clause 80 procedure. If you decide to proceed as threatened within paragraph 5 of your letter, then this will clearly be at your own risk and we reserve all of our rights to argue that further delay has been caused by your failure to properly administer the contract.

We would also remind you that the adjudications have confirmed that the question of whether or not a Notified Departure has occurred is a matter of fact and is entirely independent from the issue of the extent to which Clause 80 has been complied with. Although we maintain that we have complied with Clause 80, compliance therewith within any particular timescale is not a condition precedent to our entitlement to recover time and money flowing from the occurrence of a Notified Departure. Presumably you will be advised of the serious consequences of ignoring notices issued by us.

6. We are aware of the provisions of clause 65.2 but do not see the nexus between these notification requirements and the issues you raise in this letter which turn on the efficacy of clause 80.
7. We disagree with your view that the make-up of the Construction Works Price is a 'Deliverable' and can find nothing in the contract which supports this notion. We have no contractual obligation to, and therefore do not consider ourselves obliged to provide you with any detailed make-up of the Construction Works Price.
8. We acknowledge our obligation to take reasonable mitigation measures to minimize tie's costs, exercising a reasonable level of professional skill, care and diligence. We are doing so. However, this entire paragraph of your letter ignores the effect of Clause 6.4 which makes it clear that in so doing, our ability to arrange our affairs in whatever manner we consider fit in order to exercise our rights and perform our obligations, takes precedence. Likewise, our obligation to minimize costs etc does not relieve tie of its obligation to meet its contractual liabilities, including in relation to Notified Departures and changes. We are not obliged to provide you with the additional information you request in each Estimate and shall not do so. However, to the extent that you consider we are failing to meet any of our obligations in respect of the clauses of the contract quoted (which we deny), please let us know and if warranted, we will look to provide you with information in response to any specific request.

It would appear from this letter and from others received by us over the past few days, that there has been a deliberate decision by tie to focus on areas where it is alleged that Infraco is failing in its contractual obligations. The continued focus on Estimates is one such area. We are, of course, acutely aware of our obligations to assist you with audits and to assist you in complying with your own statutory duties, and will continue to oblige in this regard. However, if this project is to move forward in any meaningful way, there must be a corresponding acknowledgement by tie of its contractual obligations. This includes an acknowledgement that this contract (which was negotiated at arms length by large organisations over many months with considerable legal advice) is clear in its terms.

tie cannot now complain that certain conditions are not to its liking and therefore *de facto* seek to set them aside. tie must accept that this is not a fixed price contract and that the covenanted pre-requests for the execution of the Works, have not been fulfilled. Once this is acknowledged, we would hope that the project can be administered in such a manner as to achieve real and substantial progress by permitting Infracore to comply with its obligations under the contract.

Yours faithfully



M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

Encl: "Comparison of BSC Estimates and tie Change Orders Issued" as at 9 February 2010.

cc: M. Berrozpe
A. Urriza
A. Campos
R. Walker
M. Flynn

A handwritten signature in black ink, appearing to be 'M. Foerder'.

Tie CHANGES
Comparison of BSC Estimates and Tie Change Orders Issued

Table with columns: Ref, Date Estimate Issued, Change Order No, Change Order value £, Count, BSC Estimate, Tie Change Order value £, Notes. Contains detailed project data for various construction tasks.

Tie CHANGES
Comparison of BSC Estimates and Tie Change Orders Issued

Last Updated

17/02/2010

Item No.	Description	BSC Estimate Issued	Change Order No.	Change Order value £	Status	£		Initial Estimate	Notes
						Revised Estimate	Final		
414	Sample soil testing to embankments between Russell Road and Water of Leith	03/09/2009	107	24,716	1		88,784	2833	73,167
431	Stew existing BT duct at A8 underpass	05/08/2009	108	22,847	1		26,917	3225	28,917
125	Unforeseen Ground Conditions at Haymarket Viaduct	18/10/2009	109	94,317	1	94,317		3826	113,502
191	Discovery of concrete encased lighting cable - Chalmers 339 RHS	11/09/2009	110	180	1		180	3485	180
242	TRO Presentations by SDS to the public during September 2008 and changes to drawings	15/10/2009	111	23,480	1	23,480		3790	23,480
77	DESIGN ONLY to Amend line of route design section 5C (Batch 5/22) Prior approval approval	04/08/2008	112	5,369	1		5,369	3211	85,986
370	Existing Ground levels at Edinburgh Park Bridge	03/07/2009	113	61,851	1		61,851	2942	88,297
203	BDOJ to IFC changes to depot access road	22/10/2009	114	78,675	1		78,675	3547	78,675
7	The issued for Construction (IFC) dates from the Design Delivery Programme have been entered	19/02/2009	116	3,524,000	1		3,524,000	162	3,420,743
428	Alteration of Drainage at Eastfield Avenue to avoid a clash with Utilities	08/10/2008	121	1,065	1		1,065	3725	1,065
309	Edinburgh Park Bridge (S27) - South Abutment Base Formation	08/05/2009	123	9,495	1		9,495	1696	53,127
505	Traffic signalling control at Junction 41 - Lothian Road/Charlotte Street/Princes Street	19/11/2009	124	137,105	1		137,105	53824	137,105
369	Temporary works solution to maintain Thos and C & W services and discontinue water main at	11/12/2009	126	20,325	1		20,325	4145	20,325
282	Request for instruction to deal with Japanese Knotweed at rear of First Scotrail Haymarket Depo	12/05/2009	128	24,283	1		24,283	2683	24,283
436	Lothian Road pedestrian disruption	09/10/2009	129	8,640	1		8,640	3740	8,640
434	George Street Emergency road closure	30/09/2009	130	1,516	1		1,516	3649	1,516
151	Excavate and replace existing B O material within existing utility trenches.	26/11/2008	133	1,066	1		1,066	728	77,792
288	Carry out Scottish Power Diversion at Gogar Roundabout	16/01/2010	133	70,163	1		70,163	4395	70,163
112	IFC Drawing Change Haymarket Viaduct	15/10/2009	112,115	86,173	1		86,173	3444	399,728
87	Duct Installation at Leith Walk	05/01/2009	4,13	300	1			1237	299
360	Alteration of Design at Forth Ports Road 8	08/05/2009	54a	11,933	1	11,933		2576	3,264
409	Forth Ports - New construction at Ocean Drive	12/05/2009	70a	2,818	1	2,818		2804	3,264
259	Cycleway at Edinburgh Park Station repositioned down with the LOD	07/05/2009	72a	52,095	1		52,095	2220	64,324
307	Contaminated Soil assessment at Haymarket Depot	07/05/2008	76a	54,987	1		54,987	2492	60,449
438	Noise & Vibration Surveys and Reports in the city centre (SIEMENS)	23/07/2009	83a	148,128	1		146,128	53707	146,128
Percentage of value of TCO vs Original Estimate Submitted (Status 9 Feb 2010)		87%		11,175,457		1,057,130	10,694,749	12,852,556	
115	IFC Drawing Change Carricknowe Bridge	04/02/2010	95				165,508	2565	339,028
146a	IFC Drawing Change Russell Road Retaining Wall 4	14/05/2009	101				1,840,408	3804	4,597,847
104	IFC Drawing Change Baird Drive RTW	14/09/2009	119				1,545,711	2564	3,802,618
105	IFC Drawing Change Balgreen Road Retention Wall	13/06/2009	120				382,179	3275	800,976
85	TN C008 - Lindsay Road Retaining Wall Cost Estimate (Now based on IFC Drawings as agreed with Ie)	03/03/2009	125	484,065	1		484,065	1783	1,281,200
121	Urban Traffic Controls (UTC) associated with delivery of the alignment	08/10/2009	103	396,535	1		6,636,394	3080	7,520,732
304	Provisional Sum for Extra Over for Shelf Grip at Junctions	20/07/2009	104	156,298	1		1,043,880	3092	1,043,880
155	IFC Drawing changes to various RTWs 14A, 14B, 14C, 14D, 15A, 15B, 15C, 15D	23/05/2009	127	141,169	1		1,148,820	2908	1,146,620
76	Gogar Depot Public Transport proposals Guide to Railway Improvement Projects (GRIP) sections 4B & 4C2	19/06/2009	131	50,000	1		727,430	2671	743,851
				12,403,498	131	Grand Total	25,724,074	34,139,308	

Note: Denotes that a construction Estimate will be required once a design is finalised