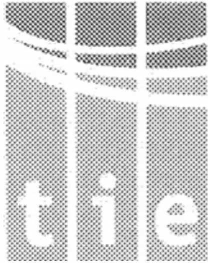

For the Attention of Richard Walker
Chairman of the Infraco Consortium Board
Bilfinger Berger Siemens CAF Consortium
9 Lochside Avenue
Edinburgh Park
Edinburgh EH12 9DJ

Our Ref: INF CORR 4112

Date: 16th February 2010

Dear Sirs,

I have been asked by Richard Jeffrey to respond to the contractual issues you raise in your joint letter dated 3 February 2010.

I have also been asked to make it clear that our Chairman and Chief Executive reserve the right to correspond with any party they feel has relevance to obtaining your performance of the Agreement. Your portrayal of Mr. Mackay and Mr. Jeffrey as "tie's senior management" is ill considered.

The issues raised in your letter are responded to below, referencing each bullet point.

Bullet Point 1

We deny that Infraco have fully discharged its obligations to take all reasonable steps to mitigate delay to the Infraco Works and that such delays are the responsibility of tie under the Contract. Moreover we deny that the Revision 2 programme was fully mitigated and we agree that you replaced it with the MUDFA 8 programme. We note that you agree with what Richard Jeffrey confirmed in this regard in his email to David Darcy dated 19 January 2010. We do not believe that you have acted in the spirit of the agreement he reconfirms (see our letter also dated 19 January 2010).

At the meeting which took place in your offices on 1 February 2010 Martin Foerder candidly confirmed that the intention behind the manner in which you are revising the programme is to establish an extension of time. It is a well established principle that global assessment of extension of time (and loss and expense) is only permissible if and to the extent that it is not possible to make a detailed assessment or ascertainment. This is clearly not the case here.

You have failed to give adequate substantiation of extension and to assist you we offered an extension of 9 months to add to the previous extension of 7.6 weeks which was agreed to settle the entitlement arising from the difference between SDS Programme V26 and SDS Programme V31. It established the completion dates which reflected some misalignment (known at the time) in SDS Design. Despite all of this, you are not programming your works to complete by the extended dates for completion.

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delivering transport projects

Your most recent draft shows completion in October 2013 – that is in some 45 months time. The original period for completion was 38 months and you have completed not more than 15% of the work. Utility diversions are currently forecast to be completed by August 2010 – some 60% of On-street work areas are currently programmed to be available by June. In essence, in construction terms, this is not a complicated job and there have been no material changes to its alignment or structures. The bulk quantities of earthworks and materials are very modest and the Depot is well underway. Currently you can take possession of some 80% of the total site. Asserting that you require or are even entitled to a further 45 months to complete your works, in spite of your obligation to mitigate delay, creates a strong impression that you are ignoring your obligations under the Agreement as well as the spirit of what was agreed between Messrs Darcy and Jeffrey.

Bullet Point 2

We do not agree with your interpretation of Clause 80; it ignores your duties and obligations in what is an entire agreement. Your interpretation would fundamentally change the meaning and intent of Clause 80 which is to create a change mechanic, not a means to justify delay in discharging your obligation to progress the works.

We have regularly requested and instructed that you accept the spirit of Clause 80.16 and proceed with the works with due expedition, yet you persist with asserting that Clause 80 does not permit Infraco to commence work in respect of a **tie** Change (including Notified Departures) until instructed through receipt of a **tie** Change Order for each INTC, or after the Change has been referred to DRP. If indeed its terms are intended to place restrictions on you (as you assert and we deny) this can only be in order to protect **tie**. It would be plainly absurd to interpret the Agreement as barring **tie** from instructing otherwise.

It is on this reasoning that we say we do not understand why you should see it as being necessary to suspend parts of the work without due cause in order not to prejudice your entitlement to payment of increased value, albeit you believe it arises from a Mandatory **tie** Change.

Bullet Point 3

We note that your latest report states you have completed IFC packages and a newly amended forecast total of 277 (112 was forecast at contract award) and that you have notified c130 INTCs which relate to alleged design changes.

Also noted that we have agreed 128 **tie** Change Orders with a total value of £13.4m compared with your opinion submitted under Clause 80.4 valuing these at £22.5m.

It is the manner in which you are seeking to apply the terms inter alia of Schedule Part 4 which leads to the conclusion that something is wrong with its words.

Following the alignment process, in finalising the design, changes may arise by:

i. changes to Employer's Requirements instructed by **tie** – where this has happened we have admitted responsibility; or

ii. changes in Employer's Requirements necessitated by either SDS or yourselves but not instructed by **tie**; or
iii. negligence by SDS or yourselves including failure to satisfy the Approvals Body on grounds of content or quality.

You should also take cognisance of the Agreement placing an obligation on you not to seek "double recovery" (Clause 121) echoed at paragraph 1.4 of Schedule Part 4 and that we have a duty to take reasonable steps to assure that you haven't.

If you agree that not all changes from BDDI to IFC are Notified Departures, we expect that you will agree that items ii and iii above are not entitlements to changes.

Our summary position on your interpretation of Schedule Part 4 is that we disagree with you and that we have every confidence that our interpretation will be upheld.

Bullet Point 4

Whatever your view may be on the purpose of the "mobilisation payment", it is a fact that currently you have been paid 40% of the Construction Works Price and executed less than 15% of the contract works after 41% of the extended time has elapsed; a very different position to that which was envisaged in May 2008.

In response to your penultimate paragraph, it seems a contrived position for you to elect to instigate the DRP procedure before you will commence what you purport to be **tie** Changes and then insist upon estimates that force us to resort to adjudication. You ignore the fact that by referring your valuations to Dispute Resolution they have, on average, been reduced by some 40% in value. Moreover, as you persist in offering no explanation by way of full Estimates we have been obliged in some cases to use the Dispute Resolution process to obtain enough information to be able to discharge our own obligations to assess your assertions. This is a regrettable result of how you seek to interpret the Agreement and is another demonstration that your interpretation is flawed.

It is **tie**'s earnest desire that Infraco recognises all its duties and obligations and brings about completion with due expedition. In our letter dated 19 January 2010 we confirmed that our Board fully recognises that Infraco are entitled to whatever the Agreement prescribes for them.

Yours faithfully

Steven Bell
Project Director – Edinburgh Tram

cc: Michael Flynn, Siemens
Antonio Campos, CAF