

DRP REFERRAL - 2

TIE LIMITED

**POSITION PAPER PURSUANT TO PARAGRAPH 9.2
OF SCHEDULE PART 9 (DISPUTE RESOLUTION PROCEDURE)**

relating to

the agreement between **tie Limited**

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

2 March 2009

PD CORR 158

CEC01032608_0001

1. INTRODUCTION

- 1.1 There is a dispute, difference and/or unresolved claim ("**Dispute**") between **tie** Limited (hereinafter referred to as "**tie**") and the Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles delivery consortium (hereinafter collectively referred to as "**Infraco**") in connection with or arising from the agreement between **tie** and the Infraco in connection with the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* (hereinafter referred to as the "**Infraco Contract**").
- 1.2 **tie** requires the Dispute (as further particularised below) to be referred to the Internal Dispute Resolution Procedure in accordance with *paragraph 9 of Schedule Part 9 (Dispute Resolution Procedure)* of the Infraco Contract.

2. THE DISPUTE

- 2.1 The Dispute concerns the issue of whether Infraco is obliged pursuant to the Infraco Contract and without further instruction, to proceed with carrying out of Works on Princes Street, Edinburgh from 21st February 2009 at the latest.
- 2.2 In this Position Paper, **tie** is seeking certain orders and declarations.
- 2.3 Accordingly, any additional declarations, orders or claims for damages or loss which are additional to the redress sought in this Position Paper and any referral to follow hereon fall outwith the scope of the present Dispute, being reserved for future agreement or Adjudication, legal or other proceedings and **tie** does not seek any orders for payment or otherwise in the present Position Paper. **tie** reserves the right to do so.

3. TIE'S POSITION ON THE DISPUTE

- 3.1 The Infraco Works as described in the Infraco Contract include works on Princes Street. Without comment on any underlying delay to progress, it is common ground that the works on Princes Street were due to commence on the morning of 21 February 2009 as defined in the Princes Street programme.
- 3.2 Following lengthy meetings in November and December 2008 **tie** on 12 January 2009 gave a Notice of Change (Ref: INF CORR 573) for the provision of a contingency bus lane at Princes Street for a period of two weeks during the carrying out of those works ("**the Change**"). Infraco prepared and sent to **tie** an estimate ("**the Estimate**") dated 11 February 2009 relating to the proposed Change.
- 3.3 **tie** issued **tie** Change Order No 21 on 13th February 2009. The work to be carried out and the estimated Actual Cost of this work as claimed in the Estimate is agreed and it is only the correct method of calculating Head Office Overheads and Profit, Consortium Preliminaries and other Preliminaries elements that is not agreed. The valuation of the preliminaries aspect has been referred separately for resolution under the Dispute Resolution Procedure, however the technical and logistical aspects of implementing the Change had been worked up and approved.
- 3.4 Notwithstanding the agreement and approval referred to in paragraph 3.3 above, Infraco stated by email on 18 February 2009 (timed at 14:07) that Infraco were not

obliged to commence work on Princes Street giving reasons of the lack of an exclusive licence to the Designated Working Area and the non-agreement of an Estimate.

- 3.5 By letter dated 19 February 2009 (Ref: PD CORR 148) **tie** affirmed the agreement and approval of implementation of the **tie** Change and, secondary to that agreement, instructed Infraco to implement the Change pursuant to *Clause 80.15* and directed Infraco in the same terms pursuant to *Clause 80.13*. The letter was relayed to Infraco by **tie's** Representative as an instruction.
- 3.6 By email on 19th February 2009 Infraco stated that they did not consider that they were obliged to accept the instruction set out in **tie's** letter of 19th February 2009.
- 3.7 Infraco maintain that they were and are not obliged to commence works on Princes Street under the Infraco Contract.

4. **REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE**

- 4.1 **tie** requires the Infraco to meet Infraco's contractual obligations in relation to carrying out Works on Princes Street without further instruction and without imposing conditions on doing so which are outwith the Infraco Contract.

5. **REQUIRED REDRESS**

- 5.1 A declaration that Infraco are obliged under the Infraco Contract and without further instruction to proceed with carrying out of Works in Princes Street from 21st February 2009 at the latest.

6. **TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE**

Infraco provided two reasons to support their view that they were not obliged to commence work in Princes Street by email on 18th February 2009, that being the lack of exclusive licence and a prior agreement to an Estimate. **tie** notes that Infraco's explanation of its position on this issue has developed from the original statement on 18 February 2009 in that in subsequent communications, new reasons have appeared and original reasons have not been repeated and may have been dropped. Further, the grounds have been stated in short and oblique terms without explanation and with active refusal to explain. **tie** will address each of the grounds put by Infraco so far, as follows:

6.1 Infraco do not have exclusive licence to occupy Princes Street.

6.1.1 **tie** response

- 6.1.1.1 Under Clause 18.1.2, **tie** grants Infraco exclusive licence to occupy Designated Working Areas (defined as "*any land, worksite or areas of the public road which Infraco occupies for purposes of executing the Infraco Works for the relevant programmed construction period*"). Nowhere does the Infraco Contract relieve the Infraco from its obligation to progress the works at a particular location simply because **tie** has as instructed a Change which reduces the area available within the Designated Working Area. In order for this to be factually sustainable, the reduction would have to make it physically

impossible to work in Princes Street or to stop reasonable access/egress to and from the work site. This is not the case and Infraco do not rely on this being the case.

6.1.1.2 Infraco have known about the reduced area of the exclusive occupation zone on Princes Street since at least November 2008. *Clause 80* provides the means whereby Infraco can state what impediment a Change may create. Infraco reported none to **tie**. Infraco's assertion, 48 hours before works are due to start, that access is an issue has no credibility. The more so because Infraco actions have been mobilising and preparing for the works.

6.1.1.3 In previous detailed minuted discussion and in correspondence and meetings, Infraco have said nothing to **tie** at all about reduction in site size causing inability to enter and work in Princes Street. The assertion 48 hours before planned works start is a breach of *Clause(s) 7.1, 7.3.1 and 7.3.16*.

6.1.1.4 *Clause 80* provides the contractual mechanism for **tie** Change. Infraco has not offered any grounds for refusal to implement a **tie** Change pursuant to matters set out in *Clause 80.12*. It is **tie's** position that there are no grounds for refusal.

6.2 The Estimate has not been agreed.

6.2.1 **tie** response

6.2.1.1 The factual position is that the Parties have settled a considerable time ago how the western bus lane (retention for 2 weeks) change Estimate will be processed under an agreed extended valuation timetable. The only outstanding point is the correct method of evaluating preliminaries.

6.2.1.2 Princes Street has been in the Scope of Works from day one. There is no contractual justification for not starting in Princes Street.

6.2.1.3 Infraco has already agreed to carry out the change to the Infraco works but if Infraco say they have not, *Clause 80.13* and *Clause 80.15* instructions have been given by **tie** which are clear and require execution of the works.

6.3 Infraco cannot plan how to execute works because of the Change.

6.3.1 **tie** response

6.3.1.1 Infraco has already planned how to execute the original works under the physical conditions introduced by the Change.

6.4 **tie** instructions are outstanding or that **tie's** instructions are invalid.

6.4.1 **tie** response

6.4.1.1 Clear instructions were proposed on the Change by **tie** Notice of Change. Further instructions have been given under *Clause(s) 80.13*

and 80.15 to execute the Change as well as the works. There is no basis for asserting these are not complete instructions.

6.5 There are technical obstacles in that overhead line bases track form and road reconstruction details have not been finalised – Infraco suggest that they do not have revised Issued For Construction drawings to allow Princes Street construction to be commenced.

6.5.1 **tie** response

6.5.1.1 None of these items is connected with the bus lane Change.

6.5.1.2 None of these items prevents commencement of works on Princes Street.

6.5.1.3 Trackform details - **tie** understand that whilst certain design details may be awaited by Infraco from its designer, this matter is solely for Infraco and any lack of readiness on its part has nothing to do with Infraco's obligations to commence and continue with the work.

6.5.1.4 Overhead line details – **tie** understand that whilst certain design details may be awaited by Infraco in respect of overhead line bases, any change or revisal to the design for that element were at the instance of Infraco and accordingly this is a matter solely for Infraco and any lack of readiness on its part has nothing to do with Infraco's obligation to commence and continue with the work.

6.5.1.5 Road reconstruction details – Issued for Construction drawings are available for the work and work should commence on that basis. Following design workshops a process has been agreed and a design Change has been issued to deal with the various design options that may be available upon completion and analysis of roads test results. The design options can only be ascertained and any subsequent agreed construction Change implemented upon the completion of the agreed process for roads testing as the work progresses. This is not a matter which would prevent Infraco from commencing the works on Princes Street.

6.6 In the event that **tie's** understanding of the Infraco position is wrong then **tie** reserves its position to make further submissions once the position of the Infraco becomes clear.