

Our ref: 25.1.201/KOR/1772

02 March 2009

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For the attention of Mr Steven Bell Tram Project Director

Dear Sirs,

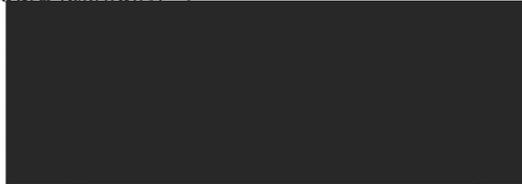
Edinburgh Tram Network Infraco
Schedule Part 9 - Dispute Resolution Procedure – Clause 9.2 Position Paper, reference PD CORR
147 Dated 19 February 2009.

We refer to your letter ref. PD CORR 147 dated 19 February 2009 in which tie referred two issues to the
Dispute Resolution Procedure provided under Schedule Part 9 of the Contract namely:

1. *Our failure to agree the Estimate in relation to the tie Change; and*
2. *Your assertion in your message under reply that you are not 'contractually obliged to commence works in Princes Street'.*

In accordance with Clause 9.2, we hereby serve in accordance with the provisions of Clause 111
(Notices) of the Agreement, our written "Position Paper" upon tie.

Yours faithfully,


C H R Brady
Project Director
Bilfinger Berger Siemens CAF Consortium

Enc. Infraco Position Paper (2 pages)

Infraco Position Paper

Introduction

On 12 January 2009 tie issued a Notice of Change regarding Princes Street construction works (ref. INF CORR 573).

In its letter dated 19 February 2009 (ref. PD CORR 147), tie gave notice that it was referring two issues to the Dispute Resolution Procedure under the contract in accordance with the Schedule Part 9.

Infraco's Representative and tie's Representative failed to resolve the matters in the meeting on 20 February 2009 that was held in compliance with Paragraph 9.1 of Schedule Part 9.

Following such failure to resolve matters Paragraph 9.2 of Schedule Part 9 requires each party to serve a written Position Paper upon the other party. This is the Position Paper for Infraco.

The Dispute

The two issues identified by tie's letter of 19 February 2009 are:

- "1. *Our failure to agree the Estimate in relation to the tie Change; and*
2. *Your assertion in your message under reply that you are not 'contractually obliged to commence works in Princes Street'.*"

The Change in question is referred to in numbered paragraph 2 in tie's letter:

- "2. *We gave to BSC notice of change on 12th January 2009 detailing a requirement simply to retain the option for a two week period during the carrying out of the works in Princes Street, to allow use of the westbound bus lane.*"

Tie go on to state:

- "3. *You have no grounds whatsoever for refusing to implement that change and have not given notice of refusal to do it and not, until today, stated any opinion that you are not obliged either to implement the change or indeed to proceed with any works on Princes Street. You have stated simply that an Estimate has not been agreed and that you are precluded from properly planning and executing the works with the consequential delay and disruption. Your e-mail goes nowhere near a legitimate reason for refusing to implement this change.*"

Factual Background

Upon receipt of the tie Notice of Change dated 12 January 2009 (ref INFO CORR 573), Infraco proceeded to calculate an Estimate as required by clause 80.4 of the Contract. Infraco provided tie with its Estimate in draft form on 12 February 2009 (later issued formally under cover of letter dated 16 February 2009 – ref. 25.1.201/IL/1568). The Estimate included Infraco's opinion that the Change would result in an increase in the sums due to be paid to Infraco under the contract in the amount of £8,001.96 ex VAT.

Tie purported to issue a tie Change Order No. 21 on 13 February 2009 (ref. INF CORR 758) with a value of £6,546.55 ex VAT. However, this was on the basis of their unilateral amendments to Infraco's Estimate which had not been agreed with Infraco.

In terms of clause 80.13 of the Contract, tie may only issue a tie Change Order after the contents of the Estimate have been agreed (subject to clause 80.15). Clause 80.13 goes on to state:

"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 unless otherwise directed by tie."

Therefore, as at the date of tie's letter referring the two issues to Dispute Resolution (19 February 2009), Infraco was prohibited from progressing with the works described in tie's Notice of Change.

Tie's letter of 19 February 2009 also purports to instruct Infraco to proceed with the Change with immediate effect in terms of clauses 80.13 and 80.15. tie state:

"...We therefore direct you to commence all works in implementation of the change without agreement or determination of an Estimate, pursuant to Clause 80.13 of the Contract. Furthermore, under Clause 80.15 upon reference to Dispute Resolution Procedure (see below) tie consider the change to be urgent and you are required to implement this change with immediate effect."

As tie's letter seeks to refer a pre-existing dispute to Dispute Resolution Procedure, any issue arising from an instruction given in the same letter as the notification of dispute cannot form part of that dispute.

Infraco's Position

In respect of the two issues referred to the Dispute Resolution Procedure by tie, Infraco's position is as follows:

1. *Our failure to agree the Estimate in relation to the tie Change*

Infraco acknowledges that the Estimate has not been agreed. It maintains that its Estimate is a reasonable one which complies with the requirements of Clauses 80.4 to 80.8 of the Contract.

Infraco denies that it failed to agree the Estimate in relation to the tie Change notified on 12 January 2009. Tie made no attempt to agree Infraco's Estimate and instead purported to issue a tie Change based on its unilateral amendments of the Estimate. In those circumstances Infraco cannot be said to have "failed" to reach agreement.

Infraco maintains that there is no provision within the Contract which allows tie to unilaterally decide the value of a tie Change and that tie are bound under the contract to reach agreement with Infraco, which is the essence of this dispute.

Infraco remains willing to discuss the contents of the Estimate and reach agreement if possible with tie.

2. *Your assertion in your message under reply that you are not 'contractually obliged to commence works in Princes Street*

As at the date of tie's letter commencing the Dispute Resolution process, Infraco remained bound by the provisions of clause 80.13 and were contractually obliged not to carry out the works which were the subject of the Notice of Change.

Redress

Infraco seek:

1. Agreement that Infraco did not fail to reach agreement of the Estimate in relation to the tie Change.
2. Agreement that Infraco are not obliged to comply with the purported tie Notice of Change dated 12 January 2009 to commence that work in Princes Street.

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