

Our ref: **25.1.201/CHBB/837**

4 November 2008

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For the attention of Steven Bell

Dear Sirs,

**Edinburgh Tram Network Infraco
Instructions and Possible Amendment to Change Mechanism**

We refer to previous negotiations and correspondence, in particular your letter no PD CORR 120 dated 19th August 2008, our letter no 25.1.201/CHBB/499 dated 18th September and now your letter no INF CORR 31.4 dated 31st October in relation to the proposed amendments to the Contract to ensure that it works effectively to manage the volume of Changes currently in process.

Whilst the exchange of correspondence on methods of dealing with urgent change is useful, we do not consider your latest proposal is an appropriate way to proceed:

1. we do not accept, for the reasons identified below, the assumption that tie is entitled to instruct changes under Clause 80.13 of the Contract.
2. the solution proposed by you is not consistent with the discussions between us (i.e. a cap on the amount of work carried out pursuant to any such mechanism and a commitment by tie to respond to an Estimate within an agreed time). We had understood these principles to be agreed.

We have, pending agreement, and following meetings between Willie Gallagher / Richard Walker and Michael Flynn, acted in good faith to progress the Infraco Works.

As regards Clause 80.13, we do not accept that this clause can be interpreted in the way suggested in your letters of 19 August and 31 October. There a number of reasons for this including:

- If Clause 80.13 was to be interpreted in the way that you suggest, Clause 80.15 (which sets out specific circumstances in which tie can instruct the Infraco to proceed pending agreement of the Estimate) would be redundant.
- The payment provisions contain no provisions to address how the Infraco would be paid for works carried out pursuant to an instruction from tie under Clause 80.13. Clause 67.4.3 does provide for payments for "any other sums due to or from the Infraco under or arising out of this Agreement in accordance with its terms" but unlike Clause 80.15 (where payment is expressly addressed under Clause 80.16), there are no terms of the contract to apply in respect of a Clause 80.13 instruction.

If Clause 80.13 was to be interpreted as you say, then either there would be a need to imply detailed payment provisions into Clause 80 to address payment or the conclusion is that the payment mechanism as a whole is not an "adequate mechanism for determining what payments become due under the

contract and when" as required by the Housing Grants etc Act. That conclusion might have potentially dramatic effect on the payment mechanism as a whole.

In the circumstances, we think that the correct interpretation of the words "unless otherwise directed by tie" is one that does not require the implication of additional terms and does the least damage to the contract as a whole.

Our view, therefore, is that the words in Clause 80.13 should be considered simply as the lifting of a prohibition against the Infraco taking a course of action that it may elect to take. That does not, in our view, create any positive obligation on the Infraco to proceed with the relevant work.

We have, notwithstanding this uncertainty and following assurances given at the aforementioned Gallagher/Walker/Flynn meeting, continued with the works for which a relevant valid instruction has not yet been received. However, we are not willing to allow this situation to continue. It is therefore crucial that you and we reach urgent agreement on a mechanism for urgent instructed change that does not rely on clause 80.13. Our proposal made on 18th September met this objective but your proposal of 31st October does not.

We are currently reviewing the numerous instructions you have issued since Contract commencement which are not supported by a valid clause from the Contract, and will produce a schedule of works affected as soon as possible. Should it not be possible to resolve the issue of invalid instructions, we will take steps to secure works in progress and mobilise resources in the relevant areas, to minimise our ongoing expenditure for which there is no clear method of reimbursement.

We would hope to have reached resolution with you by mid November, to avoid this interruption to works in progress.

Yours faithfully,



C H B Brady
Project Director
Bilfinger Berger Siemens CAF Consortium