

20.3

tie Remediable Termination Notice in respect of Clause 60
– Programme and Responses thereto.

Advanced Copy

16 AUG 2010



For The Attention of Martin Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium
9 Lochside Avenue
Edinburgh Park
Edinburgh EH12 9DJ

Our Ref: INF CORR 5819

Date: 16th August 2010

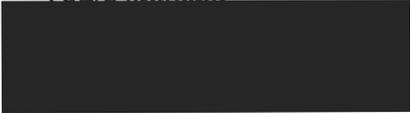
By fax and by hand

Dear Sirs,

**Edinburgh Tram Network- Infraco
Remedial Termination Notice – Infraco Default (a): Clause 60**

Please find enclosed a Remedial Termination Notice issued in accordance with Clause 60 of the Infraco Contract.

Yours faithfully


Steven Bell
Project Director – Edinburgh Tram

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REMEDIAL TERMINATION NOTICE**INFRACO DEFAULT (a): CLAUSE 60****1. Infraco Default (a)**

- 1.1 The Infraco has breached its obligations under Clause 60.2 of the Infraco Contract by not updating the Programme in accordance with the provisions of Schedule Part 2 (*Employer's Requirements*).
- 1.2 The Infraco has breached its obligations under Clause 60.9 of the Infraco Contract by not taking all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works.
- 1.3 Individually and cumulatively, these breaches materially and adversely affect the carrying out and completion of the Infraco Works. As a result of these breaches, the Infraco is not carrying out the Infraco Works to a meaningful or contractually compliant Programme. In breach of these provisions, and in breach of the Infraco's obligations under Clauses 6.1 and 7.2 of the Infraco Contract, the Infraco has failed to give tie any visibility of how the Infraco Works are progressing in accordance with the Programme (as defined in the Infraco Contract), any slippage or any mitigation measures to limit the over-run to the Programme. This denies tie the ability to exercise its rights under the Infraco Contract and denies tie the right to make a decision about instructing acceleration measures pursuant to Clause 61.2 of the Infraco Contract.
- 1.4 This is an Infraco Default (a) under the Infraco Contract.

2. Nature of Infraco Default which requires to be rectified

- 2.1 For the duration of the Infraco Contract (since 14 May 2008), the Infraco has failed to comply with the provisions of the Infraco Contract by:
- 2.1.1 not updating the Programme in accordance with the requirements of Schedule Part 2 (*Employer's Requirements*); and
- 2.1.2 not taking all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works by not applying measures to limit the over-run to the Programme and wrongly assuming that "Designated Work Area" means a full intermediate section of the Infraco Works.
- 2.2 tie has thereby been denied its contractual entitlement to consider whether it would be appropriate to issue instructions pursuant to Clause 61.2 of the Infraco Contract.
- 2.3 Repeatedly throughout the duration of the Infraco Contract to date, tie has corresponded with the Infraco on this matter and discussed this matter with the Infraco, in an attempt to uphold tie's contractual entitlements under Clauses 60.2 and 60.9 and Schedule 2 (*Employer's Requirements*) of the Infraco Contract. The Infraco has persisted in not complying with the terms of the Infraco Contract on this matter.
- 2.4 tie expressly instructed the Infraco in writing to properly update the Programme in accordance with the Infraco Contract, which includes allowing for mitigation measures, by the following letters:



Date	Reference
15 March 2010	Ref: INF.CORR. 4426
1 April 2010	Ref: INF.CORR. 4648
20 May 2010	Ref: INF. CORR. 5092

2.5 tie expressly required the Infraco in writing to comply with the Employer's Requirements, including inter alia Section 12, by the following letters:

Date	Reference
2 July 2010	INF. CORR. 5449/MJ
16 July 2010	INF. CORR. 5632/MJ

2.6 As at the date of this Remediable Termination Notice, the Infraco has not complied with tie's instructions pursuant to any of the letters mentioned in paragraphs 2.4 and 2.5 above, thereby having a material and adverse effect on the carrying out and completion of the Infraco Works.

3. **Rectification Plan**

3.1 tie looks forward to receipt of a comprehensive rectification plan from the Infraco addressing this Infraco Default (a) within 30 Business Days of the date of this Remediable Termination Notice.

for and on behalf of tie Limited



Project Director

16 August 2010 Date

Our ref: 25.1.201/KDR/6791
Your ref: INF CORR 5819

Bilfinger Berger-Siemens- CAF
Consortium

24 September 2010

BSC Consortium Office
9 Lochside Avenue
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For the attention of Steven Bell – Project Tram Director

Dear Sirs

**Edinburgh Tram Network Infraco
Infraco Contract: Alleged Remediable Termination Notices (Clause 60 - Programme)**

We refer to your letter dated 16 August 2010 (INF CORR 5819) which purports to enclose a Remediable Termination Notice in relation to matters associated with Infraco's obligations under Clauses 60.2 and 60.9 of the Infraco Contract.

As at the date of writing you have served Remediable Termination Notices in respect of another 5 matters. None of these matters have been the subject of referrals to dispute resolution. It appears to us that tie has abandoned the contractual mechanism for resolution of disputes. This may be because every major issue of principle has been decided against tie in adjudication. However, that is no justification for now abusing the termination provisions of the contract. It is clear that tie is now pursuing a policy of serving a Remediable Termination Notice in respect of each and every grievance it may have, regardless of the significance of each grievance and its implications for the Infraco Works. Whilst we will respond to each Remediable Termination Notice in turn, we object to tie's adoption of this policy.

For the avoidance of doubt this letter does not nor is it intended to constitute a rectification plan. If and to the extent the Infraco considers it necessary or appropriate notwithstanding the views expressed in this letter such a plan will be sent under separate cover.

We summarise our response to the Notice as follows:

1. The Notice does not identify a breach or breaches of contract by Infraco.
2. The alleged breaches or breaches do not materially and adversely affect the carrying out and/or completion of the Infraco Works.
3. The Notice does not therefore identify an Infraco Default (a).
4. Your letter does not therefore constitute a valid Remediable Termination Notice.

5. Any attempt to terminate the Infracore Contract on the basis of this alleged Notice will be entirely without contractual basis.

This is further explained as follows:

1. No Breach of Contract

We consider that the Notice is far from clear in specifying in what ways we are allegedly in breach of contract (this is in itself surprising, standing the potential implications of the service of such a Notice). We have done our best to interpret the basis of the allegations made, mainly by reference to the correspondence noted below. Following this analysis, we consider that the alleged breaches of contract appear to fall into two categories:

- (a) A failure to comply with the Employer's Requirements including inter alia section 12 (tie's express instructions in relation to this allegedly being set out in letters of 2 July 2010 (INF CORR 5449/MJ) and 16 July 2010 (INF CORR 5632/MJ); and
- (b) Failure to properly update the Programme including allowing for mitigation measures (tie's express instructions in relation to this allegedly being set out in letters of 15 March 2010 (INF CORR 4426), 1 April 2010 (INF CRR 4648) and 20 May 2010 (INF CORR 5092).

We shall deal with each of these matters in turn.

1.2 Failure to Comply with the Employer's Requirements

The letters referred to above identify three alleged breaches of the Employer's Requirements and despite the use by you of the words 'inter alia' we necessarily restrict our response to these specific allegations of breach. Even then, your letters are not in themselves clear in respect of the ways in which we are in breach of the various clauses quoted. However, interpreting this as best we can, we respond as follows.

- 1.2.1 Firstly it is said that we are in breach of clause 12.1.2 (Progress Reporting). It is not clear in what respects you consider that we are in breach of this clause of the Employer's Requirements but we consider that your specific concern may relate to the four weekly look ahead programme. To be clear, clause 12.1.2 only requires that our progress reports should include a *'four weekly forecast of all activities'*. This could simply be a list of all the activities to be carried out in the next four week period but we have chosen to provide this information in the form of a programme. We have been and continue to provide this programme in full compliance with this contractual obligation.
- 1.2.2 Secondly it is alleged that we are in breach of clause 12.2 (Programme Management). You do not detail the specific respects in which you consider that we are in breach of this clause and accordingly, it is difficult to answer these allegations. We consider that we have been complying with our obligations in this regard by providing you with a fully detailed and

comprehensive programme illustrating how the Infraco proposes to execute the whole of the Infraco Works.

For the reasons already explained at length to you in meetings and via formal Infraco correspondence, we are recording progress against the most realistic programme "Programme (Revision 3A)" to complete the Infraco Works. This is in the interests of effective management and communication of the programme for completion of the Infraco Works. To record progress solely against Programme (Revision 1) would be entirely meaningless. We are well aware that this Programme is unachievable. This is acknowledged by, amongst other things, the repeated references to the 9 month 'offer' (also variously referred to as an 'award') of an extension of time made in your letters of 13 November 2009 (INF CORR 2785) and 24 November 2009 (INF CORR 2911).

As you are aware however, we have also been reporting progress against the Programme (Revision 1).

- 1.2.3 It is alleged that we are in breach of clause 12.8.1 of the Employer's Requirements and in particular that we have failed to provide Planning deliverables in Primavera V6 which should '*specifically be supplied in complete, self-contained and fully editable formats*'. We find it hard to interpret this comment given that clause 12.8.1 refers to a number of Acceptable File Types (including MS Project 2003). However, given the comments in your letter, we consider that your concern may relate specifically to the four weekly look ahead programme. In this regard, please see our comments at paragraph 1.2.1 above.

Lastly, we would make a general comment that the tone of your previous letters in relation to these matters indicates a clear confusion on the part of you between our obligations to provide updated programming information (which we consider we have complied with), with the agreement of a revised Programme for the Infraco Works. We have repeatedly made attempts to agree a revised Programme with you which is well documented. You have refused to accept our revised programmes (Revision 2, Entitlement, Revision 3, Revision 3A and Revision 3B) submitted for approval in accordance with Clause 60.3 of the Infraco Contract for reasons not supported by the Infraco Contract (including a misunderstanding by you on the distinction between mitigation and acceleration). This is dealt with below.

We do not consider that we are in breach of Clause 60.2 in any way.

1.3 Failure to properly update the Programme including allowing for mitigation measures

- 1.3.1 Specifically it is stated that we are in breach of Clause 60.9 in that it is alleged that we have not taken all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works, and to reflect this in an updated Programme.
- 1.3.2 We consider that the programmes submitted for approval do contain proposals for mitigating the impacts of known delays to the extent that we are able to do

so, whilst maintaining our contractual rights which include, amongst other things, the right not to have to work alongside others (including the MUDFA Contractor). tie has continued to demonstrate a misunderstanding of the distinction between measures to mitigate delay and the concept of acceleration (indeed, at various times it has been stated that Infraco's duty to mitigate may 'include measures of acceleration').

1.3.3 The distinction between acceleration and mitigation was one of the main areas of dispute at the recent adjudication on Infraco's entitlement to an extension of time in respect of delays to the MUDFA Works. Infraco's position in this regard has been clearly upheld and supported by Mr. Robert Howie's decision in that adjudication. In particular, it was held that (i) the duty to mitigate does not include an obligation to accelerate; (ii) specifically mitigation seeks to limit an over-run to the Programme (a) without increase in overall resources applied to the works or (b) the abandonment of Infraco's contractual rights. In the three letters you rely upon in support of the alleged breach of Clause 60.9, the 'mitigation' measures you refer to are matters which have subsequently been determined by Mr. Howie to be based on a misunderstanding of the Infraco Contract on the part of tie. Accordingly, and in light of Mr. Howie's decision, we do not consider that the letters referred by you identify any basis for maintaining that we have failed to mitigate the effects of any delay to the progress of the Infraco Works.

1.3.4 Lastly, we are not in breach of contract in any way for *'wrongly assuming that Designated Work Area means a full intermediate section of the Infraco Works'*. This is a matter which, if anything, affects only Infraco's entitlement to an extension of time. It is entirely incorrect to state that it has any bearing whatsoever on whether or not Infraco has taken all reasonable steps to update the Programme in accordance with the Infraco Contract.

2. **Carrying out and/or Completion of the Infraco Works not materially and adversely affected**

Neither of the alleged breaches identified by you materially or adversely affects the carrying out and completion of the Infraco Works.

We are reporting, monitoring and managing the Infraco Works to completion against a programme "Programme (Revision 3A)" which is the most realistic and achievable programme to completion of the Infraco Works - this can only be in the best interests of the project overall to ensure that the Infraco Works are carried out as effectively and efficiently as possible. We have nevertheless continued to also report progress against Programme (Revision 1).

Beyond this, we consider that we have taken all reasonable steps to mitigate the effects of any delay to the progress of the Infraco Works as we are obliged to do in accordance with Clause 60.9 of the Infraco Contract (whilst maintaining our contractual entitlements as explained above).

Any failure to mitigate on our part to the extent that it exists (which we deny), would only act to limit the extent to which we may be entitled to an extension of time. It could not be said to be a breach by us which materially and adversely affects the carrying out and completion of the Infraco Works – in all cases it will be the underlying event occasioning the delay, rather than the extent to which that delay has or has not been mitigated, which is likely to have any material impact on the carrying out and completion of the Infraco Works.

3. No Infraco Default (a)

It follows from the preceding paragraphs that the circumstances you narrate in your Notice do not meet the definition of "Infraco Default (a)" in the Infraco Contract Schedule Part 1, contrary to your assertion.

4. Letter INF CORR 5819 is not a valid Remediable Termination Notices

As no Infraco Default has occurred, you have no right to serve any Remediable Termination Notice as you have purported to do.

5. No right to Terminate

No grounds for termination can arise from these alleged Notices.

We invite you to withdraw your purported Notice served with letter INF CORR 5819.

Yours faithfully,

M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

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



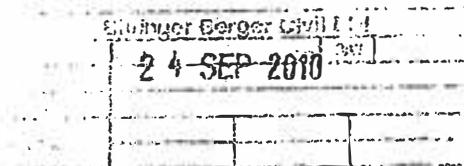
SIEMENS



Our ref: **25.1.201/KDR/6805**

24 September 2010

the limited
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For the attention of Steven Bell – Project Tram Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Alleged Remediable Termination Notice (Clause 60 - Programme)
Rectification Plan

We refer to your letter dated 16 August 2010 (INF CORR 5819) which purports to enclose a Remediable Termination Notice in relation to matters associated with Infraco's obligations under Clauses 60.2 and 60.9 of the Infraco Contract.

We further refer to our response to this letter also of today's date (25.1.201/KDR/6791). As stated in our letter, we do not consider that you had or have any grounds for the service of this Remediable Termination Notice which is accordingly invalid and which we have invited you to withdraw.

Notwithstanding this, and without prejudice to our position as set out in our letter (25.1.201/KDR/6791), we offer the following by way of Rectification Plan, in accordance with the Infraco Contract and in respect of the matters contained in your letter of 16 August 2010 (INF CORR 5819).

As explained in our separate letter today (25.1.201/KDR/6791), we are recording progress against the most realistic programme "Programme (Revision 3A)" to complete the Infraco Works. However, we have also been recording progress against the Programme (Revision 1). It has come to our attention that for reporting periods 3-3 and 3-4 we omitted to provide you with our progress report against the Programme (Revision 1). We now rectify that position and attach programmes showing progress against the Programme (Revision 1) for these periods.

Yours faithfully,

[REDACTED]
M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

Encl. Period Reports 3-3 and 3-4, Update Progress against Programme (Revision 1)

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

- Time chalnage programmes - not provided
- Long lead times for materials – not identified
- Witnessing, testing etc of the Infraco works - not included
- Records of time spent against activities completed weekly against planned works – not provided
- Cost/spend tables provided – not provided

Additionally, there is a range of other information required which may be provided each period in the revised programme submissions you make. However, the information is not explicit in the programme and requires a great deal of extraction of such information by tie.

Finally, in respect of your general comment about tie's alleged confusion relating to programmes and programming information – we are not confused but suggest that you may wish to create confusion to support your arguments.

1.3 Failure to properly update the Programme including allowing for mitigation measures

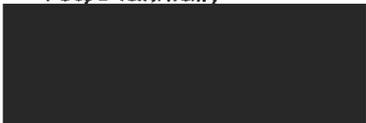
We fully understand the award made by Mr Howie in respect of MUDFA Rev 8 and the reasons he gives for making such as award and note your comments. You rely on his detailed reasons to justify your statements made in paragraphs 1.3.2 and 1.3.3 and make certain assumptions and interpretations to suit your arguments.

You are required to provide potential mitigation measures in any Estimate and any Programme update. What you do not mention in your letter is that Mr Howie also stated that you are bound to put forward a reasonable recommended solution, being the one that you are minded to adopt, as well as other possible solutions that have been considered and, you have discarded. You are required to produce evidence of the comparative exercises which identify the most cost effective among the proposals considered by you. Accordingly you should, in fact have provided details of the different methods considered and discarded by you, in addition to the one proposed.

Mr Howie's opinion considers that your approach of concentrating on Intermediate sections rather than Designated Working Areas was mistaken. It follows that you have disregarded the ability to work in smaller areas where access was available. This is a mitigation measure which could have been implemented but was not.

We have responded separately to your proposed rectification plan in respect of our Remediable Termination Notice (reference INF CORR 6386, dated 7th October 2010) which is not acceptable.

Yours faithfully



Steven Bell
Project Director – Edinburgh Tram

Bilfinger Berger UK Limited etc.	
Ref:	07 OCT 2010
Adm:	
Disburse:	



For The Attention of Martin Foerder
 Project Director
 Bilfinger Berger Siemens CAF Consortium
 9 Lochside Avenue
 Edinburgh
 EH12 9DJ

Our Ref: INF CORR 6386

Date: 7th October 2010

Dear Sirs,

**Edinburgh Tram Network - Infraco
 Remedial Termination Notice – Infraco Default (a) : Clause 60
 Rectification Plan**

We write with regard to your rectification plan submitted on 24th September 2010 (Ref 25.1.201/KDR/6805).

Your proposed rectification plan is not acceptable as it does not comprise a comprehensive rectification plan which sets out how you intend to remedy the Infraco Default subject of the Remediable Termination Notice.

Without prejudice to our rights pursuant to Clause 118, our decision is inter alia in recognition of the following :

- The programmes provided do not comply with the Employer's Requirements, Section 12, and you have not provided any information about how you intend to rectify this.
- The progress updates provided do not comply with the Employer's Requirements, Section 12, and you have not provided any information about how you intend to rectify this.
- The Revision 3A programme has been rejected by tie (INF CORR 5092) over four months ago, and
- You have not provided any information on any reasonable steps you intend to take to mitigate the effects of any delay to the progress of the Infraco Works and to apply measures to limit the over-run to the Programme .

Yours faithfully,



Steven Bell
 Project Director – Edinburgh Tram

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