

20.4

tie Remediable Termination Notice in respect of BB/SDS
Agreement and Responses thereto.

Billing: Berger UK Limited EDI			
Date Received	01 SEP 2010	Scanned	
File Number:			
Action			
Distribution			



FAO Mr Martin Foerder
 Bilfinger Berger – Siemens – CAF Consortium
 9 Lochside Avenue
 Edinburgh Park
 Edinburgh
 EH12 9DJ

Our Ref: INF CORR 5959

Date: 1 September 2010

Dear Sirs

**INFRACO CONTRACT: REMEDIABLE TERMINATION NOTICE
 INFRACO DEFAULT (a): BILFINGER BERGER / SDS PROVIDER MINUTE OF
 AGREEMENT**

Enclosed is a Remediable Termination Notice in respect of Infraco Default under the Infraco Contract.

We look forward to receiving your rectification plan within 30 Business Days of the date of this Remediable Termination Notice.

Yours faithfully,



Steven Bell
 Project Director Edinburgh Trams

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REMIEDIABLE TERMINATION NOTICE

INFRACO DEFAULT (a): BILFINGER BERGER / SDS PROVIDER MINUTE OF AGREEMENT

1. Infraco Default (a)

- 1.1 The Infraco has breached its obligation under Clause 11.5 of the Infraco Contract by amending the SDS Agreement without the prior approval of tie.
- 1.2 By entering into an unapproved Minute of Agreement, which has not been formally disclosed to tie, the Infraco has breached its obligations:
 - 1.2.1 pursuant to Clause 6.2 of the Infraco Contract, to procure that the SDS Provider, as an Infraco Party, works in accordance with the principles set out in Clause 6.1 of the Infraco Contract;
 - 1.2.2 pursuant to Clause 6.3.1 of the Infraco Contract, to approach Permitted Variations on an Open Book Basis, in that the Infraco has entered into a paying arrangement with the SDS Provider to influence design development to the Infraco's advantage;
 - 1.2.3 pursuant to Clause 6.3.4 of the Infraco Contract, not to interfere with tie's rights and tie's performance of tie's obligations or to prevent tie from enjoying the benefits of its rights as client; and
 - 1.2.4 pursuant to Clauses 6.3.6, 7.5.5, 73 and 80.7.1 of the Infraco Contract, to minimise costs and achieve best value by concluding an arrangement to remunerate the SDS Provider for assistance in ascertaining claims and concealing culpable delay.
- 1.3 Individually and cumulatively, these breaches materially and adversely affect the carrying out and completion of the Infraco Works.
- 1.4 This is an Infraco Default (a) under the Infraco Contract.

2. Nature of Infraco Default which requires to be rectified

- 2.1 tie was made aware by the Infraco, in December 2009, that the Infraco (through the Infraco Member, Bilfinger Berger UK Limited, now Bilfinger Berger Civil UK Limited) was seeking to enter into a Minute of Agreement with the SDS Provider, completion of which has been verbally admitted by Mr Darcy and Mr Kitzman and informally confirmed in writing by Mr Russell, all of Bilfinger Berger.
- 2.2 The Infraco did not seek tie's approval to enter into this Minute of Agreement. tie considers that such Minute of Agreement amends the terms of the SDS Agreement (including the SDS Services). tie considers that the Infraco is also of the view that such Minute of Agreement is in fact an amendment to the SDS Agreement. This is a breach of Clause 11.5 of the Infraco Contract.
- 2.3 tie believes that this Minute of Agreement reflects an understanding between the Infraco and the SDS Provider in relation to the provision of additional design services and resource in connection with the completion of the design for the Edinburgh Tram Network, as well as assistance from the SDS Provider to support the Infraco maintaining in front of tie that design

development and completion of the design, no matter why it came about, should be classed as a "Notified Departure" under the Infraco Contract, in exchange for additional sums payable to the SDS Provider.

2.4 tie believes that this Minute of Agreement was entered into partly as the Infraco was concerned that the SDS Provider may have a successful defence in relation to any claim under the SDS Agreement for late delivery of the design, as a result of the Infraco's failure to provide design information and carry out the Integrated Design Review and certification in accordance with the contract design programme. tie believes that the purpose of this Minute of Agreement was to protect the Infraco (or any relevant Infraco Member) against exposure for failures of the Infraco Member and to continue to incentivise the SDS Provider to assist with future Notified Departure claims to the cost of tie.

2.5 tie considers the facts to show that the Infraco and the SDS Provider intentionally refrained from formally advising tie of this Minute of Agreement and from seeking tie's approval. This conduct is prohibited under the Infraco Contract.

3. Material and Adverse Effect

3.1 The existence of an unapproved and undisclosed Minute of Agreement between the Infraco and the SDS Provider in relation to the development and completion of the design has a material and adverse effect on the carrying out and completion of the Infraco Works.

3.2 tie believes this Minute of Agreement contractualises the Infraco and the SDS Provider's approach to design development and completion, delay in production and actual and potential Permitted Variations, in a manner which is contrary to that anticipated and permitted under the Infraco Contract and is a deliberate interference with tie's rights as client, embodied in the Infraco Contract and the SDS Novation Agreement (to which tie, the Infraco and the SDS Provider are signatories).

3.3 Such approach varies the SDS Provider's entitlement to payment under the Infraco Contract and the Infraco's entitlement under the Notified Departure mechanism in the Infraco Contract. Such approach disguises the true status and circumstances of the design programme and design product. As the Infraco has not sought tie's approval for this Minute of Agreement, tie does not have full visibility of how this impacts upon the programme and how this interacts with the Notified Departure claims which the Infraco submits. This has a serious and continuing material and adverse effect on the carrying out and completion of the Infraco Works.

3.4 Such a Minute of Agreement interferes with design production by the SDS Provider and deploys resources in a manner other than is envisaged under the Infraco Contract. This has, as its natural consequence, a material and adverse effect on the Infraco Works.

3.5 This Minute of Agreement is contrary to the spirit of the Infraco Contract.

4. Previous Correspondence

4.1 tie has previously corresponded with the Infraco on this matter and sought to understand the arrangements in place.

4.2 tie sought to understand the relationship between the Infraco and the SDS Provider through an audit process conducted during May, June and July 2010. At the audit meeting of 14 June 2010, tie sought confirmation that no amended or additional agreement had been entered into

between the Infraco (or any Infraco Member) and the SDS Provider. The Infraco failed to respond.

4.3 tie followed this with the correspondence noted below, each seeking to ascertain confirmation whether or not there was an amended or additional agreement between the Infraco (or any Infraco Member) and the SDS Provider:

- 4.3.1 14 June 2010 (16:36) - Email from R Bell of tie to B Ochoa of Bilfinger Berger;
- 4.3.2 16 June 2010 (15:39) - Email from R Bell of tie to S Rotthaus of Bilfinger Berger;
- 4.3.3 21 June 2010 - raised by tie at the General Issues Meeting (tie/the Infraco);
- 4.3.4 28 June 2010 - raised by tie at the General Issues Meeting (tie/the Infraco); and
- 4.3.5 30 June 2010 - Letter from tie to the Infraco (reference: INF CORR 5464/RB).

The Infraco failed to provide a full and satisfactory response to any of this correspondence in relation to this issue.

4.4 tie once again expressly instructed the Infraco in writing on 13 July 2010 by letter (ref: INF CORR 5526) to provide tie with a copy of any arrangements or agreements between the Infraco, any Infraco Member, any Infraco Parties and the SDS Provider or SDS parties, and any amendment to the SDS Agreement, together with an explanation for such agreements or arrangements.

4.5 As at the date of this Remediable Termination Notice, the Infraco has not replied to this letter. As at the date of this Remediable Termination Notice, the Infraco has not complied with tie's instructions.

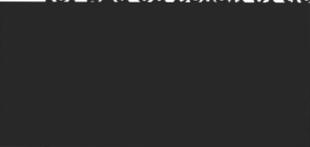
4.6 On tie's instruction, tie's solicitors wrote to the Infraco on 5 August 2010 (DLA Piper to the Infraco, copied to the Infraco's solicitors). The Infraco was instructed to provide within 5 Business Days of the date of the letter (i) full copies and details of any agreements (excluding the SDS Agreement and the SDS Novation Agreement), undertakings or other understandings or commitments which exist between the Bilfinger Berger - Siemens - CAF Consortium (either individually as a member or collectively) and the SDS Provider, in connection with the Edinburgh Tram Network Project; and (ii) a schedule of all contractual Deliverables or other documentation or data which have been influenced by or generated under such arrangements.

4.7 As at the date of this Remediable Termination Notice, the Infraco has not replied to this letter. As at the date of this Remediable Termination Notice, the Infraco has not complied with tie's solicitors' request.

5. Rectification Plan

5.1 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

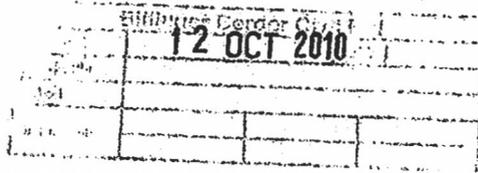
1 September 2010 Date

Our ref: 25.1.201/KDR/6950
Your ref: INF CORR 5959

Bilfinger Berger-Siemens- CAF
Consortium

12 October 2010

tie limited
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EH12 5HD



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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 (Bilfinger Berger/ SDS Provider Minute
of Agreement)**

We refer to your letter dated 1 September 2010 (INF CORR 5959).

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.

As at the date of writing you have served Remediable Termination Notices in respect of another 8 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 all 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.

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 valid Remediable Termination Notice.
5. Any attempt to terminate the Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.

1. No Breach of Contract

Neither Infraco nor any of the Infraco Members have entered into an agreement with SDS amending the terms of the SDS Agreement.

Accordingly, there has been no breach of Clause 11.5 of the Infraco Contract.

We do not deny that since the signing of the Novation Agreement Infraco has been in constant dialogue with the SDS Provider in respect of the completion of the design for the Infraco Works and that as part of that dialogue arrangements have been made to procure that the design is delivered in accordance with both Infraco's obligations under the Infraco Contract and SDS and Infraco's obligations under the SDS Agreement. We have also acted to mitigate our exposure (both in the interim and pending final determination of the many disputes and changes under this project) as a result of tie's complete failure to perform its duties in relation to the management of (and to deliver in accordance with) the contractual mechanisms for Notified Departures and Compensation Events, as admitted by you in your letter of 9 August 2010 (INF CORR 5770).

To be clear, there is no provision in the Infraco Contract or SDS Agreement which prevents us from protecting our position in this manner. In fact, allegations of a failure to manage SDS activity and mitigate delay to the project have been a persistent and recurring theme in much of the correspondence received from tie on the issue of SDS performance and design delivery.

Finally, you assert in the notice various breaches of Clauses 6, 7 and 80, without providing any detail of why you believe we have breached these provisions. Making various assumptions about your position we would respond as follows.

- Clause 6.2/ 6.3.1/6.3.4 – the obligations in these provisions do not operate so as to interfere with our rights under the Infraco Contract or arranging our affairs in whatever manner we consider to be necessary to perform our obligations or exercise our rights. The dialogue with SDS and any arrangements we have made with them to ensure we are able to perform our obligations under the Infraco Contract do not breach these provisions.
- Clause 6.3.6, 7.5.5, 73 and 80.7.1 – we take the allegations of fraud implicit in paragraphs 1.2.4 and 2.3 extremely seriously. We reiterate. Since the signing of the SDS Agreement we have sought to manage the SDS design activity to mitigate design delay and cost. This is not fraudulent behaviour, merely the arrangement of our affairs to procure insofar as practicable the performance of our obligations under the Infraco Contract.

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

You assert that the alleged unapproved and undisclosed Minute of Agreement has had a material and adverse effect on the carrying out and completion of the Infraco Works.

There has been no agreement amending the SDS Agreement. Arrangements between Infraco and/or the Infraco Members and the SDS Provider have been agreed with a view to mitigating the impact of the various Notified Departures and other changes/ Compensation Events on the carrying out and completion of the Infraco Works and have certainly not had a material and adverse effect on those works. There is no reason why Infraco would enter into an agreement or arrangement with SDS which "contractualises" an adverse affect on the carrying out and/ or completion of the Infraco Works. This denies all logic. The rights of tie as client have not been interfered with. tie's rights are at a fundamental level to have the Infraco Works completed in accordance with the contractual Programme adjusted for delay which tie is responsible for under Schedule Part 4 for a price which has been determined on the basis of Schedule Part 4 and the Clause 80 mechanism.

SDS do not have any entitlement to payment under the Infraco Contract. Infraco's sole entitlement to compensation and extension of time under the Infraco Contract is as determined

through the Clause 80 mechanism. Arrangements with SDS in respect of the carrying out and completion of the SDS Agreement do not establish any additional entitlement.

Finally we note your comments in respect of previous correspondence on related issues. We reiterate, we have not entered into an agreement amending the SDS Agreement which requires tie's prior approval in accordance with Clause 11.5 of the Infraco Contract.

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 5959 is not a valid Remediable Termination Notice

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

5. No right to Terminate

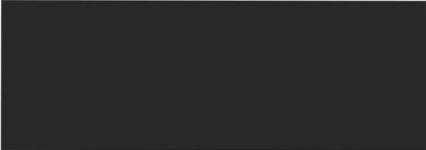
No grounds for termination can arise from this alleged Notice.

6. Rectification Plan

We note your request for a rectification plan. As there is no agreement in existence which breaches Clause 11.5 we cannot provide you with a rectification plan. In any event, even if there had been an agreement amending the SDS Agreement in breach of the provisions of Clause 11.5 this would be a breach not capable of remedy, notwithstanding the classification of Infraco Default (a) as a Remediable Termination Notice.

We invite you to withdraw your purported Notice served with letter INF CORR 5959.

Yours faithfully


M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

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

Bilfinger Berger UK Limited EDI			
Date Received	27 OCT 2010		
File Number			
Action			
Distribution			



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 6537

Date: 26th October 2010

Dear Sirs,

**EDINBURGH TRAM NETWORK
 INFRACO CONTRACT: BILFINGER BERGER/SDS PROVIDER MINUTE OF AGREEMENT**

We refer to your letter dated 12th October 2010 (25.1.201/KDR/6950) in respect of the Bilfinger Berger/ SDS Provider Minute of Agreement and related Remediable Termination Notice. We note that you do not intend your letter to constitute a rectification plan and that you have not submitted a rectification plan under separate cover. We do not understand your statement about separate letter and rectification plan. Either you are in breach or you are not.

We have sought, pursuant to the terms of the Infraco Contract to obtain information and a copy of the Minute of Agreement (or any other arrangement) from you. We have sought to achieve transparency and visibility from you of the arrangements in place between you and the SDS Provider. You admit to "dialogue arrangements to procure that the design is delivered in accordance with the Infraco Contract and SDS and Infraco's obligations under the SDS Agreement." Such arrangements clearly fall under the definition of:

"Deliverables" all documents created and/or provided by Infraco and/or any Infraco Partyin relation to the Infraco Works required to deliver the Infraco Works.

We give you notice that we will respond at the appropriate time to your refusal to rectify your breach and the statements, allegations and assertions you make in your letter. We remind you that we are entitled to exercise our contractual rights, including, but not limited, to those in respect of your failure to provide us with a satisfactory rectification plan in this matter.

Yours faithfully,



Steven Bell
 Project Director - Edinburgh Tram

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