

20.1

tie Remediable Termination Notice in respect of Clause 80  
– Tie Change and Responses thereto.



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

Our Ref: INF CORR 6316

Date: 29 September 2010

By fax and personal delivery

Dear Sirs

**INFRACO CONTRACT  
REMEDIABLE TERMINATION NOTICE**

Enclosed is a Remediable Termination Notice in respect of Infraco Default (a) 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 Tram

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## REMEDIAL TERMINATION NOTICE

### INFRACO DEFAULT (A): CLAUSE 80 - TIE CHANGE

#### 1. Infraco Default (a)

- 1.1 The Infraco has breached its obligation to comply with the contractual mechanism contained in Clause 80 of the Infraco Contract in cases where (a) tie has required a tie Change and (b) the Infraco has notified a tie Change.
- 1.2 The Infraco has persisted in refusing to comply with the contractual mechanism included in the Infraco Contract to regulate tie Changes. The Infraco has demonstrated a course of conduct amounting to an abuse of the application of Clause 80, by persistently failing to meet the contractual obligations to give contractually compliant and timely Estimates in relation to the tie Changes. The tie Change process in the Infraco Contract is recognised and is of the essence for the proper operation and discharge of both Parties' obligations.
- 1.3 This breach materially and adversely affects the carrying out and completion of the Infraco Works by causing serious delay to works which are subject to tie Changes and meaning that no contractually competent programme can be presented by the Infraco which accounts adequately for the time needed to be agreed for the execution of the tie Changes, compounded by the Infraco's refusal to progress the Infraco Works before the issue of a tie Change Order or the referral of a disputed Estimate to the Dispute Resolution Procedure. This breach materially and adversely affects the carrying out and completion of the Infraco Works by interfering with tie's rights under the contractual mechanism to deal with tie Changes pursuant to the Infraco Contract, delaying the progression of the Infraco Works and by frustrating the tie Change process and consuming tie project management and staff time.
- 1.4 This is an Infraco Default (a) under the Infraco Contract.

#### 2. Nature of Infraco Default which requires to be rectified

- 2.1 The Infraco has demonstrated an ongoing course of conduct which evidences breach of its obligations under Clause 80.
- 2.2 This course of conduct includes:

- 2.2.1 **Automatic notification of a tie Change - Infraco Notices of tie Changes ("INTCs")** are automatically notified to tie in the form of a standard letter. As at 5pm on 28 September 2010 (the eve of the issue of this Remediable Termination Notice), there have been 750 INTCs notified by the Infraco. 120 of these INTCs have subsequently been withdrawn, deleted or superseded. Out of the remaining 630 INTCs, around 125 notifications allege "design change" without explanation. The Infraco routinely submits an INTC stating that a Notified Departure has occurred (the occurrence of a Notified Departure triggers the tie Change process). The Infraco steadfastly has refused and continues to refuse to provide any explanation or proper reasons for the occurrence of the Notified Departure. This lack of transparency and visibility and intentional non-compliance with requests from tie for information (in order for tie to understand the Notified Departure) is very detrimental to the tie Change process, leading to delay, cost and, in some cases, the need for tie to refer INTCs to Dispute Resolution Procedure, simply to gain an understanding of the Infraco's position.

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- 2.2.2 **Failure to comply with time limits** - the Infraco has breached its obligation to comply with time limits contained in Clause 80 with regard to the provision of Estimates or deliver to tie a request for a reasonable extended period of time in which to submit the Estimate. The Infraco's admitted position demonstrates a systematic and endemic breach of its obligations to comply with the contractual time limits. As at 5pm on 28 September 2010, there are 630 INTCs, which are subject to the tie Change mechanism in Clause 80. Of the 630 INTCs for which an Estimate is due, only 75 Estimates have been submitted by the Infraco within the prescribed contractual time limit. Many Estimates have been received materially late (up to 492 Business Days late and an average of 137 Business Days late). 274 Estimates are currently outstanding.
- 2.2.3 **Standard letter requesting an extension of time to submit an Estimate** - the Infraco's standard type of letter notifying tie of an INTC which is issued in the majority of cases, automatically contains a request for an extension to the period of time for delivering an Estimate, without any explanation or any quantification. The Infraco systematically refuses to provide additional clarification when requested by tie.
- 2.2.4 **Failure to comply with extended time period to submit an Estimate** - where an extended period to provide an Estimate is agreed, the Infraco has always failed to submit any Estimate within the agreed extended period(s).
- 2.2.5 **Non-delivery of Estimates** - as at 5pm on 28 September 2010, the Infraco has submitted 356 Estimates (out of 630 INTCs). This means that 274 Estimates remain outstanding. The Estimate which is outstanding for the longest length of time is for 596 days. The outstanding Estimates are on average 326 Business Days late.
- 2.2.6 **Submission of incomplete Estimates** - the Infraco has repeatedly breached its obligation to submit complete Estimates in accordance with Clause 80.4. Clauses 80.4.1 to 80.4.10 of the Infraco Contract lists the matters on which the Infraco must provide its opinion (acting reasonably) in all cases where the Infraco delivers an Estimate to tie. As at 5pm on 28 September 2010, the Infraco delivered 356 Estimates to tie. The vast majority of these did not contain the Infraco's opinion on all of these matters.
- 2.2.7 **Out of the 356 Estimates which have been submitted by the Infraco, the vast majority of Estimates generally only address the Infraco's opinion to Clause 80.4.10 (increase or decrease in the sums due to be paid to the Infraco as a direct consequence of the implementation of the tie Change).**
- 2.2.8 **Non-compliance with mitigation obligations** - in providing an Estimate to tie, the Infraco has repeatedly breached its obligations under Clause 80.7 to use its reasonable endeavours to minimise any increase in costs and maximise any reduction of costs and to demonstrate that it has investigated how to mitigate the impact of any tie Change and implement the tie Change in the most cost effective manner. The Infraco has breached its obligation under Clause 6.3.1 to approach all Permitted Variations on a collaborative and Open Book Basis.
- 2.2.9 **The Infraco has not demonstrated that it has used its reasonable endeavours with any regularity to minimise costs and mitigate the impact of tie Changes for tie and implement tie Changes in the most cost effective manner. The Infraco has not demonstrated (neither as part of the tie Change obligations nor when given the opportunity to demonstrate through audits carried out pursuant to the Infraco**



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Contract) that it has taken steps to mitigate costs and obtain best value for tie with regard to tie Changes. The Infraco has evinced, and continues to evince, a non-collaborative and exploitative approach to the tie Change process and the submission of Estimates.

2.2.10 Over-valuation of Estimates - the Infraco persists in submitting grossly over-valued and inflated Estimates for numerous INTCs and has done for over two years since contract award. In respect of the INTCs for which an Estimate is submitted, the Infraco regularly re-submits its Estimate, the value of which is considerably reduced from the initial Estimate submitted. When an Estimate which has been submitted is reviewed and challenged by tie, the Infraco regularly reduces considerably the value of its Estimate. Estimates which have been challenged and settled through the Dispute Resolution Procedure have all been very substantially reduced in value.

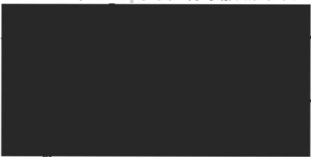
2.2.11 As at Spin on 28 September 2010, the issued tie Change Orders in respect of INTCs show an average agreed value of 53% less than the value of the Estimate submitted. This is a huge reduction, which illustrates that the Estimates are grossly over-valued by the Infraco to begin with. This conduct is contrary to Good Industry Practice, the Infraco's duty of care owed to tie and the Infraco's obligation to approach all Permitted Variations on a collaborative and Open Book Basis. In all these instances, the Infraco's conduct and over-valuation of Estimates causes delay and consumes time and tie resource in order to attempt to settle a fair and reasonable value for the Estimate.

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.

3.2 In order to rectify this Infraco Default, the Infraco would require to present a rectification plan addressing the delivery of all outstanding Estimates in accordance with the Infraco Contract; the commitment to deliver contractually competent Estimates or acceptance that tie is entitled to treat the incomplete Estimate as what is required to be valued under Clause 80 (in the absence of any further information) and any additional entitlement in respect of the relevant tie Change is extinguished; and the prompt revision of inflated Estimates. tie would also expect any rectification plan to present proposals as to how the Infraco intends to remedy going forward the course of conduct which the Infraco has demonstrated to date towards the tie Change mechanism in Clause 80.

for and on behalf of tie Limited



Project Director

*L.S. [Signature]*  
Date

Our ref: 25.1:201/KDR/7390  
Your ref: INF CORR 6316

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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 80)**

We refer to your letter dated 29 September 2010 (INF CORR 6316) which purports to enclose a Remediable Termination Notice in relation to allegations that Infraco has failed to comply with the contractual mechanism in Clause 80 of the Infraco Contract.

As at the date of writing you have served Remediable Termination Notices in respect of another 9 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.

We summarise our response to the Notice as follows:

1. The Notice contains a series of unsubstantiated and general accusations which do not identify any particular breach of Infraco's obligations under the Infraco Contract.
2. You have made no effort to describe how these accusations can be said to 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 Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.

This is further explained as follows:

**1. Allegations of Breach of Contract**

You allege that Infraco has "demonstrated an ongoing course of conduct which evidences breach of its obligations under Clause 80". We deal with your accusations below. However, by way of general comment, it is clear to us that your understanding of what constitutes a breach of contract in respect of Clause 80 is based upon your interpretation of the requirements of that Clause. There have been a series of adjudications which have addressed aspects of Clause 80 and the change mechanism. On every point of principle, tie has been shown to have been wrong. Yet it is clear from your letter of 29 September 2010, that you refused to accept the decisions of the adjudicators.

For example, you refer to Infraco's "refusal" to carry out Changes before the issue of a Change Order or the referral of the Estimate to dispute resolution and call this a "breach". Lord Dervaird's decision of 7 August 2010 makes it clear that Infraco is both required and entitled to refuse to carry out Changes in these circumstances.

We also note that your letter is so general as to be incapable of meaningful response. You make broad allegations in respect of *all* Changes when it is perfectly evident that *each* Change has to be considered on its own merits.

For example, you allege delay in production of Estimates but fail to acknowledge Infraco's requests for reasonable extended periods within which to provide Estimates given the complexity of the Estimate. This is a project where tie took 9 months to agree the period of delay attributable to the very first INTC, and a further period of 8 months through the dispute resolution procedure to agree the associated financial impact. You have failed to acknowledge delay in respect of any other INTC. The extent to which any INTC is likely to require an extension of time is inevitably bound to the extensions of time which may be awarded in respect of other INTCs. tie's refusal to even acknowledge that matters are Changes (let alone acknowledge the delay caused by them) has rendered the process unworkable and frustrated the production of Estimates.

These are general comments of course; an explanation can be given in respect of each INTC. However your purported Notice gives us no opportunity to do so.

Turning to the allegations which you allege constitute a "course of conduct":

**1.1 Alleged "Automatic" Notification of a tie Change**

With regard to the statistics you quote, as at 8 November 2010, 766 Changes have been notified – 98 by tie and 668 by Infraco. 101 of these Changes are no longer current having typically been superseded by and absorbed into more recent Changes. Of the remaining 665 Changes, tie has only accepted that 317 of these are Changes.

Infraco has notified the existence of Notified Departures in accordance with the terms of the Infraco Contract. In each case, this is done after due consideration of both the factual circumstances and also whether or not these constitute a Notified Departure in terms of the Infraco Contract. The Notices sufficiently identify the nature of the Change. References to "design change" clearly reference Pricing Assumption 3.4 and the Notices provide sufficient references for tie to be able to form its view on whether or not a Notified Departure has occurred.

In each case, tie has had more than sufficient information to form such a view, and indeed has done so. tie invariably refuses to accept the claim that a Notified Departure has occurred (thereby rendering any interest in a subsequent Estimate to be academic to tie). The basis for tie's rejection of INTCs in principle has been shown to be unfounded in successive adjudications. We refer you to the adjudications for Gogarburn, Carricknowe, Russell Road Retaining Wall 4, Section 7A Drainage etc for example. Each adjudication has proceeded upon tie's *express rejection* of the relevant Infraco Notification of tie Change (INTC), not a lack of understanding of what has been alleged.

Any delays in the Clause 80 process have been the result of tie's refusal to accept the existence of INTCs and not - as you now imply - an inability to form a view on the question.

## 1.2 Alleged Failure to Comply with Time Limits

As noted above, the period for provision of Estimates must be considered in respect of each particular Change given the provisions of clause 80.3 of the Infraco Contract. Your allegations cannot, therefore, be answered meaningfully.

We do have the following general comments however.

The consequences - in terms of time and money - for each Change that occurs on this project have to be considered in the context of all the Changes that precede it. A Change may or may not have time and financial consequences depending upon the treatment of those preceding Changes. Here, tie has systematically refused to acknowledge even the existence of INTCs, far less agree Estimates for these. This has certainly been driven by tie's misinterpretation of the Contract even after it has shown to be wrong in adjudications. It appears now that it has also been driven by concerns about tie's ability to pay for these Changes. The result has been a background of complete uncertainty which is compounded with each new Change.

It should be no surprise therefore that the full consequences of many Changes - to the level of detail demanded by clause 80.4 - are not apparent to Infraco within 18 Business Days of the INTC. Infraco has requested extended periods for submission of Estimates to take account of this complex situation, but tie *has not agreed to a single day's extension in respect of a single Change*.

Your accusations of delay in production of Estimates are presumably based upon an expectation of delivery within 18 days. It is your failure to properly administer the Contract that has given rise to the complexity that makes this time period impossible. It is your unreasonableness that has refused to acknowledge this and agree to extended time periods for delivery of Estimates.

However, we also query the concern you effect in respect of the timing of Estimates. You have failed to accept that over half of the notified INTCs are valid and you presumably have no interest in the contents of any Estimates for those INTCs, regardless of when they are produced. To complain about the timing of Estimates which you have no interest in considering is entirely disingenuous. Presumably, your complaint is that these Estimates ought to have been provided earlier in order that you could ignore them sooner?

Should you consider resurrecting the argument that you cannot decide upon the validity of an INTC until you have seen a full Estimate, we would remind you that this argument was rejected in adjudication.



**1.3 Alleged "Standard" letter requesting an extension of time to submit an Estimate**

Given the circumstances described at para. 1.2, it should also be no surprise that almost all Changes are subject to these difficulties and that an extension is more often than not required. If the letters making this request appear "standard", it is because the circumstances necessitating the request are consistent and true.

**1.4 Alleged Failure to complete with extended time period to submit an Estimate**

Not a single example is provided against this complaint. It is incapable of meaningful response (far less "rectification").

Infraco do not have a record of *any* extended time period ever having been agreed by tie.

**1.5 Alleged non-delivery of Estimates**

tie has not agreed an extended time period for delivery in respect of a single Estimate, notwithstanding the circumstances narrated at para. 1.2 above. The periods of time tie calculate for these Estimates are all, therefore, calculated by reference to the original 18 Business Day period which is hopelessly inappropriate.

As at 8 November 2010, there are 137 notified Changes for which Estimates are outstanding. Of these tie has only acknowledged that 44 are Changes.

Infraco are following a programme for preparation and/or submission of the 137 Estimates and the prioritisation is based on the latest intended construction sequence and assessed value of the Changes. Infraco have throughout the process of Estimate preparation considered the impact of the latest intended construction sequence in order to mitigate overall delay and prolongation costs.

**1.6 Alleged Submission of Incomplete Estimates**

Again, this general accusation is meaningless without consideration of specific Changes. We would note tie's previous agreement that Estimates ought to be submitted without information as to delay consequences, in recognition of the complex interaction of delaying events on the project and the difficulties in dealing with each delaying event in isolation. It is regrettable that tie seems to have retreated from the position in order to further a contractual argument, rather than try to form an accurate appreciation of the impact of these Changes on the Project.

**1.7 Non-compliance with mitigation obligations**

This too is so general an obligation as to prevent any meaningful response.

You will be aware that tie's interpretation of what are mitigation measures and the extent to which these need to be included in any Estimate was rejected by Robert Howie QC in the MUDFA Revision 8 adjudication. It does not appear however that you have accepted his opinion in that regard.

**1.8 Alleged Over-valuation of Estimates**

Your accusation of "gross-overcharging" in Estimates is no more than rhetoric. Should you wish to properly address the value of Estimates there exists a dispute resolution

procedure that allows you do so. The fact is that when the parties have done so, it is your valuation of the relevant Change – typically "nil" – that is shown to be grossly detached from reality.

In any event, any delay in reaching agreement as to the value of Estimates is not the result of the parties disputing the valuation of the Estimate, but rather your refusal to acknowledge the existence of the Change in the first place, given your failure to accept legitimate INTCs.

2. **No effort to describe how these accusations can be said to materially and adversely affect the carrying out and/or completion of the Infraco Works**

Given the very general accusations made in your letter, it is unsurprising that you are unable to make any assertion that these matters materially and adversely affect the carrying out and/or 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 6316 is not a valid Remediable Termination Notice**

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 this alleged Remediable Termination Notice.

We invite you to withdraw your purported Remediable Termination Notice served with letter INF CORR 6316.

Yours faithfully

  
**M Foerder**  
Project Director  
Bilfinger Berger Siemens CAF Consortium

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