

20.9

tie Remediable Termination Notice in respect of Manage
Design at Gogarburn Retaining Walls W14C and W14D and
Responses thereto.



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

Our Ref: INF CORR 6422

Date: 12 October 2010

Dear Sirs,

**INFRACO CONTRACT: REMEDIABLE TERMINATION NOTICE
INFRACO DEFAULT (a): FAILURE TO MANAGE DESIGN AT GOGARBURN RETAINING
WALL W14C AND W14D**

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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REMEDIALABLE TERMINATION NOTICE

INFRACO DEFAULT (a): FAILURE TO MANAGE DESIGN AT GOGARBURN RETAINING WALL W14C AND W14D

1. Infraco Default (a)

- 1.1 The Infraco has breached its obligations under clause 7.1 of the Infraco Contract to carry out and complete the Infraco Works fully and faithfully in accordance with the Infraco Contract.
- 1.2 The Infraco has breached its obligations under clause 7.2 of the Infraco Contract to ensure that, in carrying out and completing the Infraco Works, the Infraco exercises a reasonable level of professional skill, care and diligence to be expected of a properly qualified and competent professional contractor experienced in carrying out works and services of a similar nature to the Infraco Works in connection with projects of a similar scope and complexity.
- 1.3 The Infraco has breached its obligations under clause 11.3 of the Infraco Contract to procure that the SDS Provider carries out and completes the SDS Services in accordance with the SDS Agreement.
- 1.4 The Infraco has breached its obligations under clause 11.4 of the Infraco Contract to carry out all management activities in order to manage the performance of the SDS Services.
- 1.5 Individually and cumulatively, these breaches materially and adversely affect the carrying out and completion of the Infraco Works.
- 1.6 This is an Infraco Default (a) under the Infraco Contract.

2. Nature of Infraco Default which requires to be rectified

- 2.1 As at the date of this Remediable Termination Notice:
 - 2.1.1 the Infraco has not completed the Design for the Gogarburn Retaining Walls W14C and W14D;
 - 2.1.2 the Infraco has not obtained the approval of Edinburgh Airport Limited ("EAL") for the Design of Gogarburn Retaining Walls W14C and W14D in accordance with its obligations under the Infraco Contract (including Schedule Part 44 (*EAL Works*));
 - 2.1.3 the Infraco is now carrying out a redesign of the Gogarburn Retaining Walls W14C and W14D (despite it being significantly after the date of programmed completion); and
 - 2.1.4 the Infraco has notified the of an Infraco Notice of the Change ("INTC") in respect of Gogarburn Retaining Walls W14C and W14D (INTC 155c, forming part of INTC 155 notified on 16 October 2008 and subsequently split into three) and has not withdrawn the INTC as there is no Design.
- 2.2 The Design of Gogarburn Retaining Walls W14C and W14D should have been completed by the programmed date of completion of 8 October 2008.

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- 2.3 The Infraco confirmed on 28 January 2009 (letter reference: 25.1.201/IL/1360) that the IFC Drawings for the Gogarburn Retaining Walls had not yet been issued by the SDS Provider.
- 2.4 The SDS Provider issued Drawing Numbers ULE90130-07-RTW-00030 to 00047 as "Issued for Construction" on 27 February 2009.
- 2.5 The Infraco submitted, under cover of letter dated 29 May 2009 (reference: 25.1.201/SN/2764), the Reviewable EAL Works Data to tie on for onward transfer to EAL. tie sent this under cover of letter dated 5 June 2009 (reference: INF CORR 1602/MB) which *inter alia* objected to an increased risk of flooding. EAL issued an objection dated 30 June 2009, which was forwarded to the Infraco by tie by letter dated 2 July 2009 (reference: INF CORR 1718/MB). The objection raised by EAL on the flooding, as at the date of this Remediable Termination Notice, has not been resolved or withdrawn.
- 2.6 By letter dated 21 January 2010 (reference: 25.1.201/OH/4446), the Infraco confirmed that walls W14C and W14D were currently undergoing redesign and that a revised Estimate for these walls would be forwarded at the earliest opportunity.
- 2.7 As at the date of this Remediable Termination Notice, tie has not received an updated Estimate from the Infraco, nor has INTC 155c been withdrawn. tie has not received any further formally amended design from the Infraco pursuant to the Infraco Contract in respect of the redesign of walls W14C and W14D.
- 2.8 The Design of Gogarburn Retaining Walls W14C and W14D should have been completed by the programmed date of completion of 8 October 2008. A properly qualified and competent professional contractor, exercising a reasonable level of professional skill, care and diligence, would have completed the Design of Gogarburn Retaining Walls W14C and W14D sooner than two years after the programmed date of completion.
- 2.9 EAL's approval (in accordance with the Infraco Contract) for the Design should have been sought prior to the programmed date for completion of 8 October 2008. A properly qualified and competent professional contractor exercising a reasonable level of professional skill, care and diligence would have sought and taken the necessary steps to obtain the necessary approvals.
- 2.10 The Infraco has never offered any explanation for failing to request EAL's approval prior to 8 October 2008 (the programmed date for completion). The Infraco has not explained why the Design for Gogarburn Retaining Walls W14C and W14D is still incomplete.
- 2.11 The Infraco's failure to complete the design for the Gogarburn Retaining Walls W14C and W14D and failure to obtain the approval of EAL, to the extent that the Infraco requires to carry out a redesign of W14C and W14D, after more than 28 months from the date of entering into the Infraco Contract, and two years from the programmed date for completion for the Design of these works, is a manifestation of the Infraco's failure to observe its obligations under the Infraco Contract, in particular to manage the performance of the SDS Services.
- 2.12 As a result of the Infraco's failures in respect of the Design, the Infraco has failed to commence the works to construct the Gogarburn Retaining Walls W14C and W14D within Section 7 of the Infraco Works. The works to construct walls W14C and W14D are required to allow the completion of the Edinburgh Tram Project up to the end of section 7, including the construction of the Airport tram stop. The works are critical to the substantial completion of Section B of the Infraco Works.

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- 2.13 It is matter of fact that, the lack of progress of the works to construct the Gogarburn Retaining Walls W14C and W14D has a significant material and adverse impact on the construction of Section 7, which in turn has a significant material and adverse impact on the completion of Section B. It is impossible to commission the Edinburgh Tram Network without these works being carried out and completed.
- 2.14 Individually and cumulatively, the Infraco's breaches have 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.
- 3.2 tie would expect a comprehensive rectification plan to include proposals by the Infraco as to how it will ensure the delivery of a contractually compliant Design for Gogarburn Retaining Walls W14C and W14D, which is approved by EAL in accordance with the obligations under the Infraco Contract and delivered within an acceptable programme. A comprehensive rectification plan would also cover measures to ensure the progress of these works and to enable the completion of Section 7, and in turn Section B of the Infraco Works. A comprehensive rectification plan should also address outstanding INTC 155c and confirm that it is withdrawn.

for and on behalf of tie Limited

..... **Project Director**

..... **Date**

Our ref: 25.1.201/KDR/7500
Your ref: INF CORR 6422

Bilfinger Berger-Siemens-CAF
Consortium

22 November 2010

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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
Infraco Default (a): Failure to Manage Design at Gogarburn Retaining Wall W14C and W14D

We refer to your letter dated 12 October 2010 (INF CORR 6422) which purports to enclose a Remediable Termination Notice ('the Notice').

For the avoidance of doubt this letter does not nor is it intended to constitute a rectification plan.

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 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.

1. The Notice does not identify matters which constitute a breach or breaches of contract by Infraco.
2. Insofar as there is a delay in completion of the Design for the Gogarburn Retaining Walls W14C and W14D, it is accepted that this delay could materially and adversely affect the carrying out and/or completion of the Infraco Works as a whole. However, the delay in relation to this matter rests firmly with tie and not Infraco and accordingly, cannot found the basis for any entitlement to terminate the Infraco Contract. The Notice does not therefore identify matters which constitute an Infraco Default (a).
3. The Notice does not, therefore, constitute a valid Remediable Termination Notice. In addition the Infraco cannot remedy the circumstances affecting the completion of the design for the Gogarburn Walls W14C and W14D given that CEC Approval of the design and obtaining the agreement of Edinburgh Airport Limited ('EAL') is dependent upon tie issuing instructions in relation to outstanding design changes and, significantly, closing out the flood risk issue with EAL and New Ingliston Limited (NIL). Accordingly, any delay to progress is currently as a direct result of tie's inaction.

4. 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. **No Breach of Contract**

It is alleged by tie that Infraco has breached its obligations under Clauses 7.1, 7.2, 11.3 and 11.4 of the Infraco 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, which appear to relate to an alleged failure by the Infraco to finalise the design for the Gogarburn Retaining Walls W14C and W14D and apparently implicit within this, a failure to procure that the SDS Provider carries out and completes the SDS Services, and to carry out all management activities in order to manage the performance of the SDS Services.

With the exception of a bald statement that a properly qualified and competent professional contractor, exercising a reasonable level of professional skill, care and diligence would have completed the design of Gogarburn Retaining Walls W14C and W14D sooner than two years after the programmed date of completion, the Notice is entirely lacking in detail of the respects in which Infraco is said to be in breach of Clauses 7.1, 7.2, 11.3 and 11.4.

Perhaps even more surprising than this is the fact that the Notice ignores entirely the history and factual background to the development of the design for the Gogarburn Retaining Walls W14C and W14D. When the development of the design at this location is viewed in context, it is clear that, far from being in material breach of contract, Infraco has been significantly frustrated in concluding the design of the Gogarburn Retaining Walls W14C and W14D and thereafter carrying out works in this location, as a result of (i) tie's failure to reach an agreement with EAL on flood risk; (ii) the issuance by tie of many changes either relating directly to the Gogarburn Retaining Walls or in relation to the design of the canopy and kiosk at the airport tramstop which has had a significant impact on the Gogarburn Retaining Walls; and (iii) tie's failure to finalise outstanding design changes in this location. This background and the history to this matter is explained in further detail as follows.

1.1 **History and Background**

- 1.2 As tie will know, this section of the route has been subject to considerable change in scope and requirements since the time of the original SDS preliminary design submitted in June 2006, driven by a combination of the demise of the Edinburgh Airport Rail Link (EARL) Project, the agreement to and the signing of side agreements with third parties, final determination of the Limits of Deviation (LOD), and changes in requirements from tie, TEL and third parties. Whilst lengthy, in order to put into context the allegations now being made by tie in relation to finalisation of the design, it is necessary to set out what has transpired.

- 1.3 Up to the point of Novation of the SDS Agreement into the Infraco Contract in May 2008, the SDS Provider was not required to secure approval from EAL for the SDS design. This responsibility rested with City of Edinburgh Council (CEC). At the point of Novation, new requirements were added for the SDS Provider to secure EAL approval, in spite of the fact that the SDS Provider had already issued the design for this portion of work, including Gogarburn Culvert Number 3, the tramstop at the airport, and the retaining walls.

- 1.4 The conclusion of the modelling work undertaken prior to conclusion of the Infraco Contract, was that the impact of the introduction of the Edinburgh Tram Network (alongside EARL) could be mitigated via the introduction of a weir in Culvert Number 3. As a result of this, tie reduced the LOD in advance of the signing of an Agreement with NIL on 9 November 2005 (this agreement being to sell to NIL, lands which were previously within the LOD). The requirement for compensatory floodwater storage was then instructed out of the SDS Provider's scope by tie. Subsequently, the EARL project was cancelled.
- 1.5 In addition, after the point of Novation of the SDS Agreement to Infraco, upon conclusion of the Infraco Contract, change orders were issued by tie for a kiosk and canopy to be introduced at the train terminus at Edinburgh Airport on EAL lands, outwith the LOD. This resulted in a realignment of the Gogarburn Retaining Wall W14D, introducing a protrusion (outwith the LOD) into the Gogar Burn and reducing the overall channel width of the burn. In addition to the cancellation of the EARL project, this had a further direct impact on the flood characteristics and overall capacity of the Gogar Burn. The requirement for SDS (and accordingly Infraco) to accept responsibility for the hydrological modelling for the Gogarburn Retaining Walls and its associated flood plains was instructed by tie on 29 January 2009 (INF CORR 656). The result of this instruction was that, in order to resolve the hydrological modelling, Infraco was also required to look again at the design of the kiosk, the hydrological analysis, consult with SEPA, and consult with EAL.
- 1.6 tie have issued a total of ten (10) design changes related directly or indirectly to the Gogarburn Retaining Walls W14C and W14D. These are described as follows:
- 1.6.1 On 29 January 2009 (INF CORR 656) (noted above), tie instructed the design of a kiosk, hydrological analysis, consultation with SEPA and further consultation with EAL. This was covered by INTC 78. Prior to INF CORR 656, Infraco received a change to the Gogarburn Retaining Walls, related to changes to the wall finishes. This was instructed by tie on 13 January 2009 (INF CORR 583), covered by INTC 80.
- 1.6.2 Infraco have also received other changes in the vicinity of the Gogarburn Retaining Walls W14C and W14D, which have held up (and are still holding up) the Prior Approval/Planning Permission for the area, which in turn holds up the IFC of W14C and W14D. In addition, we record that these changes are outwith the LOD.
- 1.6.3 The following additional changes were also instructed by tie:
- (a) 26 March 2010 (INF CORR 4553/DC), covered by INTC 541;
 - (b) 08 February 2010 (INF CORR 4014/GMcG), covered by INTC 465;
 - (c) 14 May 2009 (INF CORR 1344/AS), covered by INTC 275;
 - (d) 04 May 2009 (INF CORR 1378/D\$), covered by INTC 277; and,
 - (e) 06 April 2009 (INF CORR 1150/DC), covered by INTC 182.
- 1.6.4 As noted above, we await instruction from tie on the following changes:
- (a) INTC 277 (DCR 0226) - OLE Base Special at the Airport Terminus - advised to tie under our letter reference 25.1.201/JHi/6037 dated 18 June 2010; and,

(b) INTC 277 (DCR 0288) - Visualisations and options for the Airport Kiosk and Canopy – advised to file under our letter reference 25.1.201/JHi/6392 dated 10 August 2010.

1.6.5 Without instructions on these matters (and resolution of the flood risk issues between tie, BAA and NIL), Infraco is unable to proceed to obtain Planning Permission for the Airport Kiosk and Canopy (or the part of the Gogarburn Retaining Walls outwith the LOD) and accordingly, the IFC design for this area cannot be finalised. This is an action which rests solely in the hands of tie.

1.6.6 In addition, tie issued tie Notice of Change 035 to Infraco for the redesign of Gogarburn Retaining Wall W14 (described only as W14 in the TNC) to accommodate 2 No Water Main Holes and 1 No Gas Main on 12 January 2009 (INF CORR 558). tie Notice of Change 035 was subsequently withdrawn by tie on 04 May 2009 (INF CORR 1377/MB) and subject to abortive costs.

1.7 From the design changes outlined above it is clear that the development of the W14C and W14D design to a satisfactory conclusion and the issue of IFC drawings, has been clearly frustrated by the issue by tie of various major tie Changes, additional third party approvals and the delay by tie in instructing the changes associated with the ongoing developments in the area. In particular, only tie can resolve the issue regarding flood risk with EAL and NIL. This is because, consequent to tie's actions in reducing the LOD pre-contract (selling land to NIL) coupled with the cancellation of the EARL project, the design solution for the flood modelling cannot be contained within the LOD but will require additional works outside the LOD in order to gain EAL's approval. This requires tie to negotiate with BAA, NIL and any other third parties with an interest. tie have been advised of this but to date, have not resolved the issue.

1.8 Without instruction from tie on the outstanding Change Orders and finalisation of the flood risk issue, Infraco cannot submit the design to GEC Planning for Approval. Without GEC Planning Approval, the final IFC design cannot be issued for the Airport Kiosk and Canopy or the Gogarburn Retaining Walls W14D. tie have been advised of this by Infraco and there have been many meetings and a great deal of correspondence on this issue. Infraco have advised tie repeatedly that it cannot arrive at a solution to the flood risk issue within the LOD and have repeatedly requested that tie resolve this issue. Against this background, it is entirely disingenuous for tie to suggest that the design of Gogarburn Retaining Walls W14C and W14D, could ever have been completed by the programmed date of completion of 8 October 2008.

1.9 We now provide comments against each of the specific allegations made within section 2 of the Notice:

1.10 **Paragraph 2.1.1-Infraco has not completed the Design for the Gogarburn Retaining Walls W14C and W14D**

This statement is correct, however it needs to be recognised by tie that Infraco currently await instructions from tie for the outstanding design changes and the close out of the Flood Model issue between tie and EAL in order to finalise the design.

- 1.11 Paragraph 2.1.2 - the Infraco has not obtained the approval of Edinburgh Airport Limited ("EAL") for the Design of Gogarburn Retaining Walls W14C and W14D in accordance with its obligations under the Infraco Contract (including Schedule Part 44 (EAL Works));

Infraco awaits the close out of the Flood Risk issue between tie, EAL and NIL. This is described in more detail within Section 1.17 and should be reviewed alongside the background information provided above.

- 1.12 Paragraph 2.1.3 - the Infraco is now carrying out a redesign of the Gogarburn Retaining Walls W14C and W14D (despite it being significantly after the date of programmed completion);

A realignment of W14D was requested by tie and EAL at the EAL Interface meeting held on 16 September 2010 to remove (or assist in removing) the EAL flood objection.

- 1.13 Paragraph 2.1.4 - the Infraco has notified tie of an Infraco Notice of tie Change ("INTC") in respect of Gogarburn Retaining Walls W14C and W14D (INTC 155c, forming part of INTC 155 notified on 16 October 2008 and subsequently split into three) and has not withdrawn the INTC as there is no Design

The INTC was split into three INTCs (155a, 155b and 155c) at tie's request, to mitigate delays to the Project by allowing tie to issue a tie Change Order for INTC 155a to cover the Notified Departure in relation to W14A, W15A, W15B and W15C. This allowed Infraco to carry out the construction of these elements of the Gogarburn Retaining Walls. tie has also now issued a tie Change Order for INTC 155b (TCO 166) in relation to W14B and W15D but has not yet issued a TCO in relation to INTC 155c, i.e. the Notified Departure in relation to W14C and W14D. It should be noted that the BDDI does not include for a canopy, or a kiosk, or a retaining wall outwith the Limits of Deviation and hence, these are Notified Departures. We refer tie to our letters 25.1.201/OH/4446 dated 21 January 2010 and 25.1.201/OH/4867 dated 3 March 2010. It is acknowledged that the design reflected in INTC 155c has been superseded. A revised Estimate will be produced once the final IFC design for W14C and W14D is available.

- 1.14 Paragraph 2.2 - The Design of Gogarburn Retaining Walls W14C and W14D should have been completed by the programmed date of completion of 8 October 2008.

For all of the reasons noted above, not least the instruction by tie on 29 January 2009 to design a kiosk, hydrological analysis, consultation with SEPA and further consultation with EAL, this statement is entirely disingenuous. The explanation provided above as History and Background, explains in great detail why the Design of the Gogarburn Retaining Walls W14C and W14D was not completed by the programmed date of completion of 8 October 2008.

- 1.15 Paragraph 2.3 -The Infraco confirmed on 28 January 2009 (letter reference: 25.1.201/IL/1360) that the IFC Drawings for the Gogarburn Retaining Walls had not yet been issued by the SDS Provider.

This statement was correct at 28 January 2009, as the revised IFC drawings could not be issued until the design change issues referred to above were resolved.

- 1.16 Paragraph 2.4 - The SDS Provider issued Drawing Numbers ULE90130-07-RTW-00030 to 00047 as "Issued for Construction" on 27 February 2009.

We record that an IFC package was issued to tie on 27 February 2009; however, the date shown on the drawings was 06 October 2008. This package was completed prior to the design changes described above and issued to tie for information.

- 1.17 Paragraph 2.5 - The Infraco submitted, under cover of letter dated 29 May 2009 (reference: 25.1.201/SN/2764), the Reviewable EAL Works Data to tie for onward transfer to EAL. tie sent this under cover of letter dated 5 June 2009 (reference: INF CORR 1602/MB) which *inter alia* objected to an increased risk of flooding. EAL issued an objection dated 30 June 2009, which was forwarded to the Infraco by tie by letter dated 2 July 2009 (reference: INF CORR 1718/MB). The objection raised by EAL on the flooding, as at the date of this Remediable Termination Notice, has not been resolved or withdrawn.

Whilst recognising our obligations under Schedule 44 of the Infraco Contract, we note that tie are responsible for managing the third party interface with EAL and that tie have failed to manage and resolve this issue. We reiterate that Infraco awaits the close out of the Flood Risk issue between tie, EAL and NIL, including the need to carry out various flood defence construction works outside the LOD. As the party with the contractual relationship with EAL and the fact that in order to gain EAL approval, further design is required outwith the LOD that has a subsequent impact on NIL lands, only tie can resolve this issue.

We note that prior to and at the time of contract execution, it would be reasonable for Infraco to assume that the client (tie) would have, during the development of the design, liaised fully with EAL as a key third party interface to ensure that EAL had reviewed and understood the design, and were accepting the design and the associated impacts on their land due to the Edinburgh Tram Network Project. This is particularly relevant considering that, prior to the execution of the Infraco Contract, the SDS Provider was under tie's management (pre-novation). We record that pre-novation the SDS Provider was only obligated to seek approval from CEC as the interface with EAL was managed directly by tie.

Further, it would also be reasonable to assume that any changes during the development of the design would be adequately addressed by tie to ensure that the third party (EAL) was agreeable to these changes; and/or any impacts due to these changes. tie should have consulted with the third party and addressed the outcome of these discussions appropriately within the design by the client (tie). This was not the case as was made apparent when EAL advised Infraco (and tie) at the EAL Interface meeting on 28 January 2009, that EAL were not familiar with the original design.

tie's failure to manage EAL during the development of the design has resulted in the project suffering due to the conflicting positions and requirements between the various third parties. It has exacerbated the difficulty faced by Infraco in obtaining EAL's approval to the design.

This issue has been worsened by tie's decision to instruct the SDS Provider in May 2006 (pre-novation) to remove the compensatory flood water storage area. We note that had the storage area been kept within the Edinburgh Tram Network Project (as per the Line 2 Tram Act), no modification to Culvert 3 would have been required and it is highly probable that there would have been no increase in flood risk to EAL.

In addition, the cancellation of the EARL Project in July 2007 has further impacted on this issue and tie has evidently failed to fully manage the impact due to the demise of EARL on the Edinburgh Tram Network Project.

We note that the alignment of retaining wall W14D was primarily dictated by the tie/TEL/EAL requirement, for a larger Airport Terminus (i.e. kiosk and canopy) that was situated outwith the LOD. The additional retaining wall required to address this tie change increases the flood risk impact to EAL and is not due to the actions of Infraco. However, this increase in flood risk has been adequately addressed by Infraco through the proposed lowering of the weir level of Culvert Number 3.

Furthermore, we note that tie have still not fully addressed the EAL interface issues at the Airport Terminus, further demonstrating tie's failure to manage their third party obligations. We note that this is impacting on Infraco's ability to secure the Planning Approval required for the Airport Kiosk and Canopy.

As regards the flood model issue, Infraco are still assisting tie in achieving a solution to flood mitigation with EAL and NIL. Despite extensive modelling works and reworks of the design, Infraco have concluded in discussion with EAL and tie that in order to overcome the EAL objection to the Edinburgh Tram Network Project design and meet the requirements of EAL for a zero net increase to the flood risk on the airport lands, Infraco and the SDS Provider are now investigating solutions that require tram works to be undertaken outside of the LOD. This may require additional legal agreements with EAL and NIL, further approvals from SEPÁ and CEC and further delay to the Programme.

- 1.18 Paragraph 2.6 - By letter dated 21 January 2010 (reference: 25.1.201/OH/4446), the Infraco confirmed that walls W14C and W14D were currently undergoing redesign and that a revised Estimate for these walls would be forwarded at the earliest opportunity.

Infraco awaits instructions from tie and the close out of the flood model issue between tie, EAL and NIL in order to finalise the design.

- 1.19 Paragraph 2.7 - As at the date of this Remediable Termination Notice, tie has not received an updated Estimate from the Infraco, nor has INTC 155c been withdrawn. tie has not received any further formally amended design from the Infraco pursuant to the Infraco Contract in respect of the redesign of walls W14C and W14D.

As noted above, Infraco awaits instructions from tie and the close out of the flood model issue between tie, EAL and NIL in order to finalise the design.

- 1.20 Paragraph 2.8 - The Design of Gogarburn Retaining Walls W14C and W14D should have been completed by the programmed date of completion of 8 October 2008. A properly qualified and competent professional contractor, exercising a reasonable level of professional skill, care and diligence, would have completed the Design of Gogarburn Retaining Walls W14C and W14D sooner than two years after the programmed date of completion.

Refer to the explanations provided above.

- 1.21 Paragraph 2.9 - EAL's approval (in accordance with the Infraco Contract) for the Design should have been sought prior to the programmed date for completion of 8 October 2008. A properly qualified and competent professional contractor exercising a reasonable level of professional skill, care and diligence would have sought and taken the necessary steps to obtain the necessary approvals.

Refer to the explanations provided above.

- 1.22 Paragraph 2.10 - The Infraco has never offered any explanation for failing to request EAL's approval prior to 8 October 2008 (the programmed date for completion). The Infraco has not explained why the Design for Gogarburn Retaining Walls W14C and W14D is still incomplete.

Refer to the explanations provided above. tie's statement that it has no explanation on this shows that it has either not recognised the effects of its own actions in this matter, or is being entirely disingenuous.

- 1.23 Paragraph 2.11 - The Infraco's failure to complete the design for the Gogarburn Retaining Walls W14C and W14D and failure to obtain the approval of EAL, to the extent that the Infraco requires to carry out a redesign of W14C and W14D, after more than 28 months from the date of entering into the Infraco Contract, and two years from the programmed date for completion for the Design of these works, is a manifestation of the Infraco's failure to observe its obligations under the Infraco Contract, in particular to manage the performance of the SDS Services.

Refer to the explanations provided above.

- 1.24 Paragraph 2.12 - As a result of the Infraco's failures in respect of the Design, the Infraco has failed to commence the works to construct the Gogarburn Retaining Walls W14C and W14D within Section 7 of the Infraco Works. The works to construct walls W14C and W14D are required to allow the completion of the Edinburgh Tram Project up to the end of section 7, including the construction of the Airport tram stop. The works are critical to the substantial completion of Section B of the Infraco Works.

We categorically disagree that there has been any failure on Infraco's part. Refer to the explanations provided above.

- 1.25 Paragraph 2.13 - It is matter of fact that, the lack of progress of the works to construct the Gogarburn Retaining Walls W14C and W14D has a significant material and adverse impact on the construction of Section 7, which in turn has a significant material and adverse impact on the completion of Section B. It is impossible to commission the Edinburgh Tram Network without these works being carried out and completed.

It is correct that the failure to complete the Gogarburn Retaining Walls W14C and W14D will have an impact on the completion and construction of Section 7A. However, for all of the reasons explained at length in this letter, this is a matter which rests with tie and not Infraco.

- 1.26 **Paragraph 2.14 - Individually and cumulatively, the Infraco's breaches have a material and adverse effect on the carrying out and completion of the Infraco Works.**

We categorically disagree that any breach on the part of Infraco will affect the carrying out and completion of the Infraco Works. Refer to the explanations provided above.

From the explanation provided above, it is clear that the development of the W14C and W14D design to a satisfactory conclusion and issue of IFC drawings has been clearly frustrated by the issue by the of various major tie changes in requirements (i.e. new requirement for a kiosk and canopy at the Airport Terminus, the change to the finishes of W14D etc), additional third party approvals and the delay in instructing the changes associated with the ongoing developments in the area. We note that this issue could have been resolved prior to Novation, had the retained the compensatory flood water storage area.

- 1.27 To conclude, we consider that the facts and circumstances surrounding Gogarburn Retaining Walls W14C and W14D are matters which the Infraco are culpable for. Consequently, we are unable to forward a Rectification Plan in accordance with the Infraco Contract in respect of the matters referred to above until the:

- (a) provides the outstanding instructions required in relation to outstanding tie Changes;
- (b) closes out the flood risk issue between it and EAL.

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

- 2.1 It is accepted that the delay in finalising the design and the corresponding delay to construction of the Gogarburn Retaining Walls W14C and W14D, may have a material and adverse impact upon the completion of Section 7A and hence the completion of Section B. However, for all of the reasons stated in this letter, this is not a matter for which Infraco is responsible and accordingly, to the extent that there is a material and adverse impact on the carrying out and completion of the Infraco Works, the same must be held entirely responsible for this delay.

3. No Infraco Default (a)

4. 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 Agreement Schedule Part 1, contrary to your assertion.

5. Letter INF CORR 6422 is not a valid Remediable Termination Notices

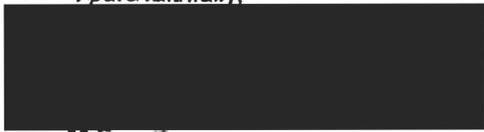
6. As no Infraco Default has occurred, you have no right to serve any Remediable Termination Notice as you have purported to do.

7. **No right to Terminate**
8. **No grounds for termination can arise from this alleged Remediable Termination Notice.**

To conclude, we consider that the facts and circumstances surrounding Gogarburn Retaining Walls W14C and W14D are matters which tie and not Infracore are culpable for. Consequently, we are unable to forward a Rectification Plan in respect of the matters referred to within the Notice, until tie provide the outstanding information required by the Infracore and conclude the flood risk Issue with EAL, all as detailed above.

We invite you to withdraw your purported Notice serviced with letter INF CORR 6422.

Yours faithfully,



M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

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

