

20.10

tie Underperforming Warning Notice in respect of alleged Defects on Princes Street and Responses thereto.

Bilfinger Berger UK Limited EDI			
Date Received	09 AUG 2010	Scanned	
File Name:			
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 5765

Date: 9th August 2010

By fax and personal delivery

Dear Sirs,

**INFRACO CONTRACT
 UNDERPERFORMANCE WARNING NOTICE CLAUSE 56.7**

Please find enclosed an Underperformance Warning Notice issued in accordance with Clause 56.7.1 of the Infraco Contract.

Yours faithfully,



Steven Bell
 Project Director – Edinburgh Trams

Citypoint Offices, 65 Haymarket Terrace, Edinburgh, EH12 5HD

Tel: +44 (0) 131 [REDACTED] Email: info@edinburghtrams.com Fax: +44 (0) 131 623 8601 Web: www.edinburghtrams.com

Registered in Scotland No: 230949 at City Chambers, High Street, Edinburgh, EH1 1Y Edinburgh Trams is an operating name of tie Ltd.

Direct dial: +44 (0)131 [REDACTED]
 e-mail: steven.bell@tie.ltd.uk
 web: www.tie.ltd.uk

UNDER PERFORMANCE WARNING NOTICE CLAUSE 56.7

INFRACO DEFAULT (a): DEFECTS ON PRINCES STREET

1. The Breaches giving rise to this Notice

1.1 The Infraco has committed a material breach of its obligations under:

Clause 7.2 of the Infraco Contract by failing 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.

Clause 26.1 of the Infraco Contract to provide all necessary superintendence during the completion of the Infraco Works and that such superintendence is given by sufficient persons having adequately knowledge of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents) for the satisfactory and safe construction of the Infraco Works.

Clause 34.2 of the Infraco Contract by failing to ensure that the materials provided and the mode, manner and speed of construction of the Infraco Works are in accordance with the Infraco Contract.

Clause 7.5.2 by failing to minimise disruption to the City of Edinburgh.

These breaches are material and continuing.

2. The matters evidencing Material Breaches

2.1 The Infraco carried out Infraco Works on Princes Street during March 2009 to November 2009.

2.2 The Infraco has installed seriously defective works on Princes Street and has failed to remedy this. There are significant faults in the works which (i) pose an appreciable physical health and safety hazard; (ii) are capable of creating further hazards; and (iii) will severely reduce the life of the pavement. There are failings in the areas which are constructed of granite setts. The Infraco has not provided adequately qualified superintendence of the Infraco Works which would have prevented the installation of defective works on Princes Street. tie's assessment, on the basis of inspections carried out to date, is that poor workmanship; an ill-advised choice of materials; inappropriate design; and the Infraco's lack of supervision on Site may have all been contributed to these defects.

2.3 The nature of the seriously defective works on Princes Street includes:

2.3.1 At a considerable number of locations on Princes Street, the bituminous bound pavement materials have cracked and broken apparently from a lack of support. It is surmised that this is (in whole or in part) caused by poor compaction in and around the rail flange.

2.3.2 There are many locations where there is a significant step down from the top of the rail and wearing surface, causing a potential hazard.

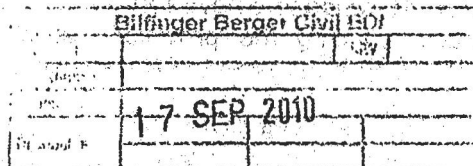


Our ref: 25.1.201/KDR/6733
Your ref: INF CORR 5765

Bilfinger Berger-Siemens-CAF
Consortium

BSC Consortium Office
9 Lochside Avenue
Edinburgh Park
Edinburgh
EH12 9DJ
United Kingdom

17 September 2010



tie limited
CityPoint
65 Haymarket Terrace
Edinburgh
EH12 5HD

Phone: +44 (0) 131 [REDACTED]
Fax: +44 (0) 131 452 2990

For the attention of Steven Bell – Project Tram Director

Dear Sirs,

Edinburgh Tram Network Infraco
Infraco Contract: Alleged Underperformance Warning Notice (Princes Street)

We refer to your letter dated 9 August 2010 (INF CORR 5765).

The purported Underperformance Warning Notice enclosed with your letter includes the heading "Infraco Default (a): Defects on Princes Street". Given that you subsequently refer us to Infraco Default (g), please explain the significance of this heading.

With regard to the content of your letter and purported Notice, we summarise our response as follows:

1. The Infraco Contract does not permit you to serve an Underperformance Warning Notice at this time.
2. The Notice does not identify a material breach of Infraco's obligations.
3. Your purported Notice does not therefore constitute a valid Underperformance Warning Notice.
4. Any attempt to terminate the Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.

1. No Right to Serve Underperformance Warning Notice

It is clear from the context of clause 56 of the Infraco Contract that an Underperformance Warning Notice relates solely to the performance of the Maintenance Services by the Infraco. The matters you raise regarding Princes Street are entirely concerned with construction and not the performance of Maintenance

Services. Your attempt to found upon clause 56.7.1 is based on a selective reading of the provisions, ignoring entirely its context.

This is evident from clause 56.10 to which you have referred us. That clause refers to increased monitoring of Infraco, echoing the provisions of clause 56.5 which is concerned with monitoring of compliance in respect of Maintenance Services.

With regard to your reference to Infraco Default (g), we would note that this refers to "Underperformance Warning Notices" which are defined as relating solely to clause 56.7.2.

2. No Material Breach of Obligations by Infraco

As noted above, clause 56.7.1 envisages the identification of a material breach of Infraco's obligations as these relate to the provision of the Maintenance Services. You have made not such an allegation. Furthermore, your Notice details no material breach of any other of Infraco's obligations under the Infraco Contract.

Your purported Remedial Termination Notices (under cover of your letters INF CORR 5771 and 5764) proceed upon the same allegations as your purported Underperformance Warning Notice. We have replied to those letters by our letter dated 17 September 2010 (25.1.201/KDR/6729) where we explain that the allegations you make do not constitute breaches of contract. We refer you to our comments in that letter rather than repeat them again here.

3. Letter INF CORR 5765 and enclosure is not valid Underperformance Warning Notices

As (a) service of an Underperformance Warning Notice is relevant only to the performance of Maintenance Services and (b) in any event, he has failed to identify any breach of Infraco's obligations, you have no right to serve any Underperformance Warning Notice as you have purported to do.

4. No right to Terminate

Given your reference to Infraco Defaults (a) and (g) we must advise you that no grounds for termination can be founded upon this purported Notice.



SIEMENS



We invite you to withdraw your purported Notice served with letter INF CORR 5765.

Yours faithfully,



M Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium

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



Origin:	Berger UK Limited EDI		
Date:	01 OCT 2010		
To:			
From:			
Distribution:			



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

Our Ref: INF CORR 6312

Date: 29 September 2010

Dear Sir,

Edinburgh Tram Network
Infraco Contract: Underperformance Warning Notice (Princes Street)

We write in response to your letter of 17 September 2010, reference 25.1.201.KDR.6733 and note your position at this time.

Yours faithfully,



Steven Bell
 Project Director – Edinburgh Tram

Citypoint Offices, 65 Haymarket Terrace, Edinburgh, EH12 5HD
 Tel: +44 (0) 131 [REDACTED] Email: info@edinburghtrams.com Fax: +44 (0) 131 623 8601 Web: www.edinburghtrams.com

Registered in Scotland No. 230945 at City Chambers, High Street, Edinburgh, EH1 1YJ. Edinburgh Trams is an operating name of tie Ltd.

Direct dial: +44 (0)131 [REDACTED]
 e-mail: steven.bell@tie.td.uk
 web: www.tie.td.uk