

Bilfinger Berger Siemens CAF Consortium
9 Lochside Avenue
Edinburgh
EH12 9DJ

Our Ref: INF CORR ***

Date: [] September 2010

DELIVERED BY EMAIL TO MR KITZMAN

STRICTLY CONFIDENTIAL – LEGALLY PRIVILEGED AND FOISA EXEMPT

Dear Sirs,

Project Carlisle – Revised Proposal for discussion and finalisation

We are in receipt of a letter dated 11 September 2010 (reference 25.1.201/EK/6682) from Infraco's Representative to **tie**'s Project Director which purports to be Infraco's Full and Final Proposal for Project Carlisle. We understand that it seeks to dismiss the detailed proposal we made on 7 September 2010 (reference INF.COR. 5990).

The Infraco Representative's letter is contrary to the working practice agreed between Infraco Members and **tie** and it departs from the essential requirements that we refer to below. We are pleased to confirm that Mr. Kitzman has continued to work with our representatives to clarify certain issues which may have prevented us reaching an agreement based on the mutual understanding which has evolved from the consultations which Mr. Kitzman has conducted with Mr. Rush and Mr. Molyneux. We will therefore not respond to the 11 September 2010 letter other than to say we reject any differences it may raise with our proposal (our letter 5990 and this letter). We also deny any explicit or implicit allegations of **tie**'s behaviour.

Our proposal is without prejudice to our rights under the Infraco Contract and in Law and cannot be founded upon by the Infraco Parties or any other parties in any proceedings, or be construed to be an offer (either in part or in whole) capable of acceptance without our express agreement in writing. Any agreement which arises from this letter will be subject to a Deed of Variation approved by a Minute of **tie** Limited's Board. Moreover, our proposal cannot be construed as implying **tie**'s admission of any liability to the Infraco Parties or **tie**'s waiver of any rights or claims against the Infraco Parties.

Governance and Guiding Principles

We do not withdraw what was set out in our letter reference INF. CORR. 5859 dated 24 August 2010 and subsequent amendments thereto agreed with Mr. Kitzman, however we make clear that the following principles are of the essence for any agreement which results from Project Carlisle:

- Price certainty for **tie** and its stakeholders.
- A fully working and commissioned Edinburgh Tram Network from the Airport to St. Andrew's Square by the earliest and most cost efficient date.

Arriving at a revised Contract Price

We make no changes to our previous proposal, other than to confirm that for the purposes on any agreement:

The application of the revised **tie** Change mechanism (revised Clause 80) in respect of changes to the Design will be subject to the following principles which will be included in the documents:

- I. The definition of "**tie** Change" will remain unamended.
- II. The Infraco Works will, *inter alia*, be described by the Design for those works which will form part of a Design Assurance Statement(s) which has been, or is to be, issued by the Infraco and which de facto certifies that any IFC Drawing which is incorporated in the said Design Assurance Statement is for a base design which is supported by a written statement of the design philosophy, explaining why it is a good, best-value, design which satisfies the Employer's Requirements and certifying that all:
 - i. Consents, including but not limited to Design Stage Consents, have been obtained from Approval Bodies and third parties;
 - ii. appropriate CEC informatives have been concluded;
 - iii. interdisciplinary checks have been carried out; and
 - iv. elements of design are integrated, which means certifying the existence of adequate, concrete and sufficient evidence of unconditional, readily accessible, sound and comprehensive integration.

A Design which fully complies with this (II) will be the "Approved Design"

- III. Any revision required to the Infraco's submissions to obtain all Consents prior to the issue by the Infraco of any part of the Approved Design will not constitute a **tie** Change.
- IV. Unless any addition, modification, reduction or omission arises from an error, discrepancy, ambiguity or default by or of the Infraco or any Infraco Parties, any instruction to add to, modify, reduce or omit in respect of any part of the Approved Design will constitute a **tie** Change.
- V. Other than to rectify and error, discrepancy, ambiguity or default by or of the Infraco or any Infraco Parties, the Infraco will not add to, modify, reduce or omit in respect of any part of the Approved Design unless instructed by **tie**.

Proposed revised Scope

Taking cognisance of the Infraco's further representations since 11 September 2010, the Infraco Works will be confined to one Part:

Part A – Airport to St Andrew's Square.

With the exception of the Omitted Civil Engineering Works (detailed in Appendix A of the draft GMP Scope of Works), completion of the Infraco Works in Part A is to be executed by the Infraco in accordance with the revised Sectional Completion Dates explained below.

Our proposal is based on the premise that the Infraco will not be required to carry out any further Civil Engineering Works east of Haymarket, other than completing the Enabling Works in Section 1A (as detailed in the GMP Scope of Works) and correcting defects between Lothian Road and Waverley Bridge.

For Part A, subject to further discussion between **tie** and CAF, the Infraco will be required to deliver no more than 20 Trams.

We are prepared to enter into discussions which may lead to the novation back to **tie** of:

1. The Tram Agreement and the Tram Maintenance Agreement.
2. The SDS Agreement for the completed, approved, assured, integrated and compliant Design of the Edinburgh Tram Network for Phases 1a and 1b, to include certification thereof by each Infraco Member, the SDS Provider and any Infraco Party or SDS Provider Party involved in the production or development of Design.

Revised dates for completion, liquidated damages, programme etc.

Hitherto, the Infraco has made no properly detailed submissions for extension of time other than in respect of Rev 1 and MUDFA Rev 8. The former has been granted and Robert Howie QC has determined by adjudication the Infraco's entitlement in respect of the latter. We also note that **tie** offered a global nine months' extension of time on 13 November 2009.

INF. CORR 5990 *inter alia* considered it to be fair and reasonable, taking account of the circumstances explained below, to set new Planned Sectional Completion Dates where Robert Howie determined them (albeit not finally binding on the Parties) with the exception of where he decided that the Infraco has no further entitlement. For those sections, we set them in accordance with **tie**'s letter of 13 November 2009.

The revised Planned Sectional Completion Dates for Part A become:

Section A	Set by Robert Howie QC	2 November 2010
Section B	Set by tie letter dated 13 November 2009	1 April 2011
Section C	Set by tie letter dated 13 November 2009	1 December 2011
Section D	Set by tie letter dated 13 November 2009	6 June 2012

Sections C and D will refer to completion at St Andrew's Square and not Newhaven.

We confirm that **tie** is prepared for its Project Carlisle representatives to enter into more detailed discussion with the Infraco on Planned Sectional Completion Dates provided that the Infraco undertakes to approach such discussions in the spirit of finding the earliest and most cost-effective completion date(s) for **tie** and its stakeholders. Such willingness includes giving **tie** access (including partial access) to the Depot (Section B) at the earliest time.

We repeat that to assist you in meeting the revised Planned Sectional Completion Date for Section D we are prepared to discuss with you measures which will allow us to reduce the period between the completion of Section C and Section D. Such measures may require

giving us partial access to Section B works and/or storing and reducing the number of trams delivered as part of the Part A Scope.

Programming

In relation to the revised Infraco Works from the Airport to St Andrew's Square, other than requiring you to meet the above dates we see no reason why we should not revise the requirements of Clause 60 in relation to Schedule Part 2 (*Employer's Requirements*) and we have agreed suitable changes to these provisions which are referred to in the attached draft **tie** Change Order.

As part of our proposal, Clause 61.8 will be deleted.

Liquidated and Ascertained Damages

As the calculation of losses reflected in Liquidated and Ascertained Damages will not be less for a truncated project, Liquidated and Ascertained Damages for the Sectional Completion of Part A will remain as stipulated by Clause 62 of the Infraco Contract.

Excluded Items

Works executed to Princes Street (Lothian Road to Waverley Bridge)

Final agreement of the costs claimed by the Infraco arising from the Princes Street Supplemental Agreement ("**PSSA**") will not be possible until the Infraco and **tie** have agreed a Rectification Plan which is approved by the Roads Authority. In the meantime, **tie** will continue to pay, on-account, the amount currently certified as an interim payment, under reservation of being able to reduce such payment on a final conclusion as to liability.

SDS Provider

Events since 24 August 2010 have added to our concern about the inclusion by you of the SDS Provider's claim for a payment of £16.275 million. It leads us to conclude that it deserves further investigation. We are therefore to carry out a detailed investigation and audit of how the SDS Provider has performed and how the Infraco has managed them. Part of that investigation will take account of the agreement you admit has been entered into between Bilfinger Berger (and possibly others) with Parsons Brinkerhoff (and possibly others).

Until such time as we are able to come to a conclusive decision on the liabilities owed by us, or owed to us, we intend to agree to no further payment for the SDS Provider. Moreover, we reserve our rights to pursue any of the Infraco Parties (either individually or jointly) for recovery (under the Infraco Contract or in delict) of any losses and damages suffered by **tie** and arising from breach of contract, negligence, misrepresentation or any other wrongful act on the part of the SDS Provider or any other Infraco Party in relation to the services provided by the SDS Provider.

The SDS Provider and the Infraco are required to fulfil their obligations to deliver the design services relating to Phase 1b. In the event that they fail to do so, **tie** will recover the amounts previously paid to the SDS Provider for these services from payments due to the Infraco.

Conditions

Any Agreement arising from this proposal will *inter alia* be subject to the following conditions:

- The Infraco shall procure such design assurance as is necessary for the Independent Competent Person to admit a design for the On-Street trackwork which is approved by and meets the requirements of the Roads Authority and of **tie** acting with absolute discretion.
- Such design assurance shall *inter alia* provide:
 - i. adequate, complete and sufficient evidence of unconditional, readily accessible, sound and comprehensive integration;
 - ii. Design Assurance Statements which are not in contradiction to the Infraco's obligations pursuant to the Infraco Contract and which do not exclude liability. This will include the removal of statements such as the following:

*"This Drawing incorporates the 'RailOne RHEDA City -C' proprietary rail fastening system developed for Edinburgh Tram Network by the BSC consortium. **The SDS trackform design incorporates RHEDA City C in its entirety without modification and accepts no liability for the suitability of the system.** For details of BSC refer to RHEDA City C typical sections ETN(TRW=TD&ATB#055716. SDS have prepared a comprehensive review of the RHEDA City System, refer to doc No. TBC for details";*
 - iii. IDC/IDR output evidence in tabular form which is essential for **tie** to carry out a review of the submissions made by the Infraco;
 - iv. integrated design assurance statements which are complete rather than interim drawings which are incomplete and which exclude cross-sections and which are not fully satisfactory in integration terms;
 - v. a complete SDS Drawing Register; and
 - vi. Inclusion of details to close out:
 - (a) CEC Informatives;
 - (b) Key ICP issues; and
 - (c) Hazard Log item mitigation closure.
- The completed, approved, assured, integrated and compliant Design for the Edinburgh Tram Network Phases 1a and 1b will include certification thereof by each Infraco Member, the SDS Provider and any Infraco Party or SDS Provider Party involved in the production or development of Design or the Infraco's Design.
- The Infraco shall be responsible for all additional costs which may arise from any development or revision to the design of the Infraco Works other than as required by a **tie** Change.
- The Infraco shall be entitled to the benefits of any value engineering savings achieved from the date of any agreement arising out of our proposal.
- The Infraco shall not be entitled to extension of time to the revised Planned Sectional Completion Dates for Sections C and D unless:
 - a **tie** procures and completes the Omitted Civil Engineering Works from Haymarket to Lothian Road and Waverley Bridge to St Andrew's Square in

such time as would prevent the Infraco, working reasonably in Designated Working Areas, from achieving those revised Planned Sectional Completion Dates; and

b **tie** issues a Change Order pursuant to revised Clause 80.

- The On-street Civil Engineering Works shall be completed by others under the direct supervision of **tie**. Other than providing design assurances in respect of the design of such works as directed by **tie** and being responsible for integrating the design of the E&M Works with the On-street Civil Engineering Works, the Infraco shall have no liability for such works.
- The Infraco shall be responsible for those Trams which have been constructed and commissioned pursuant to the Tram Supply Agreement but which are not required to run on the Edinburgh Tram Network which is constructed under the GMP Scope pursuant to our proposal. The revised Contract Price shall include for any and all storage charges, in Spain or elsewhere, or any other costs and expenses related to the spare Trams which have arisen and may arise as a consequence of delay to the completion of the Infraco Works.
- The Infraco shall deliver to **tie** all information required by the Infraco Contract for all Key Sub-Contractors which the Infraco intends to employ on the Infraco Contract.
- The Infraco Parties shall disclose all agreements which they have entered into together since 14 May 2008, howsoever arising and which they would have not entered into but for their involvement in the Infraco Contract.
- Pursuant to Clause 26, the Infraco will submit for **tie's** approval full details of the experience and qualifications of the Infraco Representative and such approval shall be at the absolute discretion of **tie**.
- Only persons nominated as Key Personnel shall have day-to-day responsibility for and be involved in the performance of the Infraco Works.
- The Infraco shall design, carry out and complete enabling works for the Edinburgh Gateway Project at a reasonable price and use reasonable endeavours to complete such works without causing delay to the completion of the revised Infraco Works - Part A.
- The Infraco shall install On-street trackwork to Part A (from Haymarket to Lothian Road and Waverley Bridge to St Andrew's Square) in accordance with the Infraco Contract and subject to **tie** issuing the Infraco with 14 days' notice to commence work and in accordance with the following provisions:
 1. The Infraco shall provide, take from store, deliver to site, and permanently install the track rails and their supports and sleepers on a foundation prepared by others, in accordance with the assured integrated design approved pursuant to Clause 19 and by **tie**, in accordance with a reasonable programme agreed by **tie**.
 2. The Infraco shall provide and permanently install in accordance with the said design chamber filling materials to the rail flanges prior to handing over the installed track to **tie** to complete the Omitted Civil Engineering Works.

3. Other than for its design, the Infraco will bear no responsibility for the foundation to the track, or for any of the Omitted Civil Engineering Works subsequent to the installation of the track.
- The Infraco shall issue **tie** with 14 days' written notice of the date by which the On-street trackwork shall be complete to enable **tie** to access, carry out and complete any remaining Omitted Civil Engineering Works. **tie** shall notify the Infraco upon conclusion of the Omitted Civil Engineering Works and the Infraco shall carry out all remaining Infraco Works, including the E & M Works and the testing, commissioning and energisation of the Edinburgh Tram Network.
 - For the purposes of section 2.7.4 of the Employers Requirements, the required maximum journey time for St Andrew's Square to the Airport will be 28 minutes, 53 seconds.

Revised Contract Price

The revised Contract Price, which comprises the total capital expenditure and revenue expenditure payable to the Infraco, including for all entitlements to additional payments (both agreed and not agreed) up to the date of the Deed of Variation, is as follows:

Part A	£
Construction Works Price Part A	See below
SDS Price	To be determined
PSSA Payment	To be determined
Tram Supply Price	45,893,997
Infraco Maintenance Mobilisation	1,633,522
Tram Maintenance Mobilisation	2,275,806
Infraco Spare Parts	1,013,090

Construction Works Price Part A

We place a fair value on this GMP Scope of Works, as a base line, at: £223,467,580 subject to increase or decrease for the following items:

- i. Re-novation of the Tram Supply Agreement and Tram Maintenance Agreement back to **tie**.
- ii. Re-novation of the SDS Agreement back to **tie**.
- iii. An arrangement for dealing with contaminated land whereby the Infraco are reimbursed on cost plus basis with a cap placed on the Infraco's entitlement for reimbursement of £8 million.
- iv. A commercial compromise adjustment agreed between the Infraco and **tie**.

Please note there will be no other form of adjustment to the Construction Works Price.

Milestone Payments

Subsequent to agreement of the revised Contract Price, revisions to the Construction Milestones in Schedule Part 5 shall have to be agreed from which interim payments may be determined.

The opening values should be calculated:

- Construction - as previously certified less any payment for PSSA and the SDS Provider; and
- Preliminaries recalculated as a proportion of Construction Milestone values.

Interim values will be calculated:

- Construction Milestones – as and when completed;
- Preliminaries – pro-rata to the difference between the opening value calculated above and the total value of Construction Milestones shown above; and
- Any overpayment or underpayment at opening shall be adjusted over a 12 month period at monthly tranches.

Bonds & Guarantees etc

There will be no revision to the Infraco's obligations pursuant to Clauses 74 to 78 inclusive.

Maintenance Agreements

We do not propose amending the terms of the Infraco Contract in relation to maintenance or the Tram Maintenance Agreements other than to reduce the payment for Part A on a pro-rata basis to the length of track commissioned or the number of Trams delivered respectively.

Project Carlisle

Our determination to see Project Carlisle through is neither deflected nor diminished by receiving your letter dated 22 September 2010 (ref 25.1.1201/KDR/6790), apparently written "without prejudice" and, in our view, without contractual merit. Nor does it contribute to a rational approach to sensible negotiations to solve what are obviously different perceptions of the cause of your extremely poor performance on this Project.

Both parties have invested time and energy in Project Carlisle and we have expressed appreciation of this often. This is not the place to deal with the assertions you now want to make, save to say that we reject them in their entirety and will reply separately in due course. If your expectation has been that tie would not use its rights under the Infraco Contract to correct your repeated delinquency you ignore our duty to act in the public interest. You should recognise that accepting terms you dictate cannot be in the public interest.

We make it clear that tie's focus on fair value is not driven by affordability constraint; it is driven by your behaviour for 30 months on this Contract for which you still haven't completed

the design. Nothing you assert can detract from this fact. We have admitted that utility diversions have been delayed, but your failure to complete the design dominates that delay.

You wrongly deem what on your part are assumptions to be corroboration of our motives, for example the Preliminaries dispute. You ignore that the Infraco Contract proscribes waiver of our rights in the event that we have taken a certain course of action which may have been favourable to you. Whatever you may care to misrepresent, misinterpret or threaten, be assured it will not deflect us from taking and in some cases accelerating the rights we have to obtain resolution of your misconduct.

Your letter exaggerates and misrepresents the status and import of DRPs decided by Adjudicators. There have been 9, not 15 as you claim. Not all have been on points of principle and by no measure have all been decided in Infraco's favour. In fact where valuation has been at issue it may be said that the results have favoured the tax-payer. Two, by Lord Dervaird and Mr. Howie Q.C., have addressed important contractual principles. Mr Howie found against the manner in which you have sought to claim extension of time and to programme your works. Lord Dervaird decided on one narrow part of the implementation of Clause 80. As you are aware, we are in the process of reviewing all INTCs submitted by you and are applying Lord Dervaird's narrowly focused decision as part of that wider exercise. It is wholly misleading to assert that Lord Dervaird's decision affects all or even more than a small minority of the INTCs you have notified.

For our part we do not demur from you doing no more than you are obligated to. Our concern is that your conduct is such that it amounts to requiring a process of attrition to get you to accept your obligations. The RTNs you refer to are an unfortunate but necessary manifestation of our frustration with your conduct.

You are right that there have been two proposals from the Infraco Representative. Reminding of this only serves to confuse because when we met after the last proposal on 11 September 2010 it was made clear to both Mr. Darcy and Mr. Wakeford how those proposals failed in meeting the essential conditions we refer to under "Governance and Guiding Principles" above. Mr. Darcy and Mr. Wakeford clearly understood that and since then we have been discussing the revisions to our proposal, which are set out herein, with Mr. Kitzman. He was confirmed to be the sole representative for the Infraco Members on Project Carlisle by Mr. Darcy and Mr. Wakeford and these conditions have been made clear to him from the outset of his involvement.

This revision to our proposal arises from discussions which took place with Mr. Kitzman before he left for his leave in the USA. Indeed we understood from him that we are to keep in contact with him whilst he is on leave and on the 18 September 2010 he expressed his own satisfaction by email with the revised definition of tie Change set out on page 2 herein.

However, we are encouraged that despite the confused message in your letter that you accept that it is time to reach a conclusion on Project Carlisle. We share those sentiments and are of course prepared to make representatives of our choice available to discuss such a conclusion.

Richard Jeffrey
Chief Executive

For and on behalf of **tie** Limited