

DISPUTE RESOLUTION PROCEDURE

INTC NO.429 – Delays Arising from MUDFA Programme Revision 8

TIE LIMITED

**POSITION PAPER PURSUANT TO PARAGRAPH 9.2
OF SCHEDULE PART 9 (DISPUTE RESOLUTION PROCEDURE)**

relating to

the agreement between tie Limited

and

Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles consortium

in connection with the works authorised by the

Edinburgh Tram (Line One) Act 2006 and the Edinburgh Tram (Line Two) Act 2006

15 September 2009

WED00000240_0001



1. INTRODUCTION

- 1.1 By way of letter dated 4 September 2009 (reference 25.1.201/WIM/3430) the Bilfinger Berger (UK) Limited / Siemens plc / Construcciones y Auxiliar de Ferrocarriles delivery consortium (hereinafter collectively referred to as "**Infraco**") gave notice to **tie** Limited (hereinafter referred to as "**tie**") that it wished to initiate the Internal Resolution Procedure in respect of a dispute, difference and/or unresolved claim ("**Dispute**") between **tie** and the **Infraco** in connection with or arising from the agreement between **tie** and the **Infraco** in connection with the works authorised by the *Edinburgh Tram (Line One) Act 2006* and the *Edinburgh Tram (Line Two) Act 2006* (hereinafter referred to as the "**Infraco Contract**").
- 1.2 This Position Paper has been prepared by **tie** pursuant to *paragraph 9.2 of Schedule Part 9 (Dispute Resolution Procedure)* to the **Infraco Contract**.

2. THE DISPUTE

- 2.1 **tie** understands that the matters referred to the Dispute Resolution Procedure by the **Infraco** in its letter dated 4 September 2009 (reference 25.1.201/WIM/3431) are:
- 2.2 Whether **Infraco** is entitled to:
 - 2.2.1 the quantum of extensions of time to the Planned Sectional Completion Dates in the Estimate provided under cover dated 6 August 2009 (ref: 25.1.201/WIM/3230), or;
 - 2.2.2 such other extensions as may be agreed or determined, and if so, the quantum.
- 2.3 For the avoidance of doubt the matters set out in this Position Paper are without prejudice to and under reservation of **tie's** whole rights and remedies in connection with any delay to the completion of the Infraco Works as a consequence of or in any way connected with the matters notified in the Infraco Notification of **tie** Change and/or the occurrence of a Notified Departure and/or the date of issue by Infraco of the Infraco Notification of **tie** Change and/or the date of delivery to **tie** by the **Infraco** of the Estimate in respect of Infraco Notification of **tie** Change and/or the absence of a **tie** Change Order in response to the Estimate.
- 2.4 There follows **tie's** position on the Dispute, together with its comments (where appropriate) on **tie's** understanding of the **Infraco's** position on the Dispute.

3. TIE'S POSITION ON THE DISPUTE

- 3.1 **tie** has previously acknowledged that the late completion of utilities work by the MUDFA Contractor is a Notified Departure and therefore, gives rise to, a Mandatory **tie** Change. As such, it falls to be dealt with in accordance with Clause 80 of the **Infraco Contract**.
- 3.2 **tie** has previously acknowledged that late completion of utilities work has adversely impacted on the progress of the works and that this may give rise to granting the **Infraco** relief from compliance with some of its obligations under the **Infraco Contract**. In particular, **tie** has acknowledged that such relief may include the granting of extension of time to the Planned Sectional Completion Dates. The contractual

process for establishing and agreeing such relief is an integral part of the submission of the Estimate required by Clause 80.

- 3.3 **Infraco** has produced no competent Estimate. References in their paper to an Estimate produced in relation to the matters the subject of the Dispute, are for convenience only and refer to **Infraco's** purported Estimate.
- 3.4 The Clause 80 contractual process for dealing with a **tie** Change, as relevant to this Notified Departure, is summarised as follows along with **tie's** position regarding what has been done and/or produced by the parties by way of compliance with that process.
 - 3.4.1 By the action of the Infraco notifying a Notified Departure (which it has done by way of its letter dated 8 July 2009 (Ref. 25.1.201/MRH/3016), **tie** is deemed to have issued a **tie** Notice of Change (Infraco Contract Schedule Part 4, Clause 3.5). **tie** agrees this is a valid notice and that it is deemed to have issued a **tie** Notice of Change.
 - 3.4.2 The **Infraco** is required to provide an Estimate for the **tie** Notice of Change within 18 Business Days (Clause 80.2.2). If the **Infraco** considers that the Estimate required is too complex to be completed and returned to **tie** within 18 Business Days, the Infraco shall, within 5 Business Days, deliver a request for a reasonable extended period of time for return of the Estimate (Clause 80.3). The **Infraco** did not request an extended period of time for return of the Estimate. By way of its letter dated 6 August 2009 (Ref. 25.1.201/WIM/3230) the **Infraco** submitted what it contends is its Estimate, 21 Business Days after serving notice.
 - 3.4.3 Clause 80.4 requires that the Estimate shall include, among other things:-
 - 3.4.3.1 Requirements for relief from obligations (Clause 80.4.1);
 - 3.4.3.2 Any impact on the programme and any requirement for EoT (Clause 80.4.3);
 - 3.4.3.3 Proposals to mitigate the impact of the **tie** Change (Clause 80.4.8); and
 - 3.4.3.4 Any increase or decrease in any sums due to be paid under the Agreement (Clause 80.4.10);

tie acknowledges that the Estimate submitted on 6 August 2009 includes requirements for relief from obligations, namely adjustment of the Planned Sectional Completion Dates. It also includes impacted programmes in support of the claimed requirement for relief, albeit these programmes were not submitted in their native software format and therefore the programming logic, constraints and prioritisation used to produce them could not be examined or interrogated. **tie** verbally requested this information from the **Infraco** on 11 August 2009. That request was rejected. On 17 August 2009 **tie** wrote to the Infraco formally requesting these programmes in the native software format and these were provided on 18 August 2009, as confirmed by the Infraco's letter dated 19 August 2009 (Ref. 25.1.201/WIM/3311).

tie acknowledges that the Estimate contains what the **Infraco** claims to be mitigation measures. However, **tie** considers these 'measures' to be simply the correction and adjustment of programming logic to address errors, omissions and superseded interdependencies, and the partial implementation of previously issued **tie** Changes. **tie** is of the opinion that effective mitigation has not been properly considered and that there exist many practical means whereby the **Infraco** could significantly reduce the impact of this **tie** Change.

The Estimate **does not include** information on costs and any increase or decrease in any sums due to be paid under the Agreement. **tie** considers this to be a fundamental shortcoming in the **Infraco** submission and prevents determination or agreement of the Estimate as required by Clause 80.9.

3.4.4 Clause 80.7 further provides that the Estimate shall, among other things, include evidence demonstrating that:-

3.4.4.1 The **Infraco** has used all reasonable endeavours to minimise any increase in costs and maximise any reduction of costs (Clause 80.7.1);

3.4.4.2 The **Infraco** has investigated how to mitigate the impact of the **tie** Change (Clause 80.7.3); and

3.4.4.3 The **tie** Change will be implemented in the most cost effective manner (Clause 80.7.4).

It is **tie's** position that the Estimate includes **none** of the evidence referred to above. **tie** is of the opinion that the Estimate does not demonstrate that the **tie** Change will be implemented in the most cost effective manner. **tie** also believes that the method of analysis adopted by the **Infraco** in seeking to demonstrate the alleged effect of this **tie** Change unnecessarily indicates excessive delays to the Planned Sectional Completion Dates giving rise to potential claims for significant prolongation costs (Reference paragraphs 6.2 to 6.4 below). As a consequence, the **Infraco** has failed to comply with the express requirements of Clause 80.7.

3.4.5 Clause 80.9 requires that, as soon as reasonably practicable after **tie** receives the Estimate, the parties shall discuss and agree the issues set out in the Estimate. If the parties cannot agree the contents of the Estimate then either party may refer the Estimate to the DRP (Clause 80.10).

3.4.5.1 In this regard, on 3 September 2009 representatives of the parties met to discuss the Estimate. At that meeting the parties explained their respective positions and concluded that each would undertake further work towards reaching agreement of the Estimate. (Refer to minutes of meeting held on 3 September 2009 – Appendix item 7)

It is **tie's** position that that first meeting, held on 3 September 2009, did not exhaust the discussions required by Clause 80.9. It is therefore premature for the **Infraco** to refer the Estimate for determination in accordance with the Dispute Resolution Procedure.

- 3.5 It is submitted that the **Infraco's** submission of 8 August 2009, supplemented by the electronic programme files sent by email on 18 August 2009, does not constitute a valid Estimate in accordance with Clause 80. The **Infraco's** failure to provide any cost information and evidence demonstrating that it has used all reasonable endeavours to minimise any increase in cost and implement this **tie** Change in the most cost effective manner, and the other deficiencies here noted has prevented the due administration of the Notified Departure.
- 3.6 The **Infraco's** method of assessing the impact of this **tie** Change on the Planned Sectional Completion Dates is considered to be inconsistent with the **Infraco's** general and specific obligations under the **Infraco Contract**. It is also at odds with established case law in relation to the analysis of delay on construction contracts. By the **Infraco's** own admission, it is an entirely theoretical analysis and produces a programme that the **Infraco** would not prepare for construction. It also lacks any meaningful effort to mitigate delay and ignores all contributory factors and other delays for which the **Infraco** is liable. The resultant Planned Sectional Completion Dates grossly over-state the true impact of the late completion of the utilities diversions and therefore the actual requirement for extension of time if this **tie** Change is implemented in the most cost effective manner.
- 3.7 The **Infraco's** approach to the preparation, submission and agreement of the Estimate for this **tie** Change is considered to be contrary to the terms of the **Infraco Contract**. Alternatively, the **Infraco** has failed in its more general obligations. In particular it has failed to:-
- 3.7.1 (Clause 6.3.1) – approach all Permitted Variations on a collaborative and Open Book Basis;
- 3.7.2 (Clause 6.3.5) – take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party (in this case **tie**) which are likely to arise out of any failure by the First Party (in this case the **Infraco**) to take any of the steps referred to in Clauses 6.3.2 to 6.3.4 (inclusive);
- 3.7.3 (Clause 6.3.6) – take all reasonable steps to manage, minimise and mitigate all costs; and
- 3.7.4 (Clause 7.5.5) – use reasonable endeavours to ensure that in carrying out the **Infraco** Works, it minimises costs.

The Estimate provided by the **Infraco** contains insufficient information from which **tie** can assess, with any reasonable degree of accuracy, the quantum of any relief it may be obliged to grant to the **Infraco** in respect of extension of time to the Planned Sectional Completion Dates.

4. REQUIRED OBJECTIVES OF REFERRAL OF THE DISPUTE TO THE INTERNAL RESOLUTION PROCEDURE

- 4.1 **Infraco's** entitlement to an extension of time, if any, does not arise naturally and automatically from the underlying event of a Notified Departure, to be recognised, evaluated and declared by **tie**. Any such entitlement arises out of agreement or determination of an Estimate. There is no competent Estimate to administer or agree.

5. REQUIRED REDRESS

5.1 A declaration that the **Infraco**'s entitlement is:

- i) to no extension of time to the Planned Sectional Completion Dates as set out in the Estimate provided under cover provided 6 August 2009 (ref: 251.201/WIM/3230); and
- ii) to no other extensions of time in relation to that submission.

6. TIE'S FURTHER COMMENTS ON AND UNDERSTANDING OF INFRACO'S POSITION ON THE DISPUTE

- 6.1 **tie** does not accept the **Infraco**'s assertion that it is necessary to agree the extension of time to be awarded before the **Infraco** can provide any information on the costs associated with the implementation of this **tie** Change. Indeed, such an assertion is contrary to the specific provisions of Clause 80. This brings into question how the parties can agree to implement any **tie** Change in the most cost effective manner without information on cost.
- 6.2 **tie** does not accept that the "as-planned impacted" method of delay analysis is appropriate or contractually correct for determining the most cost effective means of implementing this **tie** Change. It is not a reliable form of analysis from which to determine the measure of such a complex assessment of extension of time requirement. This is particularly so when no meaningful effort appears to have been made to mitigate delay and no account has been taken of contributory factors that arise from the **Infraco**'s own contractual failings, actions and inactions.
- 6.3 In its analysis of the delay allegedly caused by the late completion of the utilities diversions, the **Infraco** has adhered strictly to its self imposed restriction on track and overhead line resources (i.e. a maximum of three track gangs and two overhead line gangs working on the project any point in time). Such constraints do not appear justifiable, and certainly not from the perspective of practical considerations. Given that the programmes included in the Estimate submission are driven by these resource constraints rather than physical (hard) logic it is apparent that if the available resources are increased, the requirement for extension of time will be reduced. **tie** is of the opinion that the cost associated with increasing these resources will be a fraction of that saved from the overall reduction in delayed completion. That being so, the **Infraco**'s approach is *not* the most cost effective implementation of this **tie** Change. At the meeting held on 3 September 2009 the **Infraco** was asked to provide information on the likely costs associated with lifting these constraints. It agreed to do so but, to-date, has not provided this information.
- 6.4 The programmes submitted as part of the Estimate contain errors which incorrectly link MUDFA milestones with unrelated work. These errors distort the critical path analysis and the automated resource levelling exercise undertaken by the **Infraco** in their preparation. Consequently, they are unreliable sources of information on which to assess the actual impact of the utilities diversions delays.
- 6.5 This Position Paper is served under reservation of a right by **tie**, both in its sole discretion and in any event in response to new information coming to light, at any time to add, omit, alter or otherwise amend in whole or in part its position as set out in this Position Paper.



**APPENDIX TO THE POSITION PAPER
INVENTORY OF PRODUCTIONS FOR TIE
REFERRED TO IN THE POSITION PAPER
IN THE MATTER OF A DISPUTE**

BETWEEN

tie LIMITED

and

BILFINGER BERGER UK LIMITED; SIEMENS PLC; and

CONSTRUCCIONES Y AUXILIAR DE FERROCARRILES S.A.

1. Copy of letter from tie Limited to Bilfinger Berger-Siemens-CAF Consortium dated 30 April 2009 (reference INF CORR 1371/FMcF);
2. Copy of letter from Bilfinger Berger-Siemens-CAF Consortium to tie Limited dated 8 July 2009 (reference 25.1.201/MRH/3016);
3. Copy of letter from Bilfinger Berger-Siemens-CAF Consortium to tie Limited dated 6 August 2009 (reference 25.1.201/WIM/3230);
4. Copy of letter from tie Limited to Bilfinger Berger-Siemens-CAF Consortium dated 17 August 2009 (reference INF CORR 2050);
5. Copy of letter from Bilfinger Berger-Siemens-CAF Consortium to tie Limited dated 19 August 2009 (reference 25.1.201/WIM/3311);
6. Copy of letter from Bilfinger Berger-Siemens-CAF Consortium to tie Limited dated 6 August 2009 (reference 25.1.201/KDR/3380); 6. Copy of letter from tie Limited to Bilfinger Berger-Siemens-CAF Consortium dated 28 August 2009 (reference INF CORR 2116/SC);
7. Copy of letter from Bilfinger Berger-Siemens-CAF Consortium to tie Limited dated 9 September 2009 (reference 25.1.201/WIM/3475) with minutes of the meeting held on 3 September 2009;
8. Copy of letter from Bilfinger Berger-Siemens-CAF Consortium to tie Limited dated 4 September 2009 (reference 25.1.201/WIM/3430);