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**From:** Richard Jeffrey  
**Sent:** 19 January 2010 17:57  
**To:** Anthony Rush; david\_mackay@[REDACTED] Graeme Bissett (external contact); Steven Bell; Dennis Murray; Susan Clark; Alastair Richards; Stewart McGarrity; Mandy Haeburn-Little  
**Subject:** FW: Private and Confidential  
**Attachments:** Status of Estimates submitted - As of 6th January 2010.xlsx

Let's see what happens next!

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**From:** Richard Jeffrey  
**Sent:** 19 January 2010 17:56  
**To:** 'David Darcy'  
**Subject:** Private and Confidential

David,

You raise several points in your email dated 11<sup>th</sup> January 2009 which I need to reply to, and there are other matters which I think helpful to raise. I haven't circulated this email, but I expect that you may wish to give a copy to other Infraco Members.

I believe that you and I have aligned overall objectives; however our means of reaching them may be different in some respects. Your attendance in Edinburgh in the near future would be most helpful I think. It is important in the next few weeks for us to be able to demonstrate a new attitude to getting on with the job. I trust that you will accept the following notes as a basis for discussion between us rather than a definitive contractual submission.

I realise that you may not like what I have to say on some matters, but my Chairman's letter to each of the Infraco Members was indicative of **tie** wishing to see Infraco make a new beginning and I trust that you will agree that it is better that you and I get everything out in the open so that we can resolve the difficulties which abound.

#### **Resources and urgency**

Martin's Foerder's concern about the urgency with which **tie**'s management address issues is not a new complaint, and is one that I am very aware of. Each time the complaint has been made I have investigated it and reassured myself that Steven Bell and his team have all the resources they require, that they have the proper priorities and have dealt with matters in a reasonable time frame. Since I started on this project I have been aware of a constant level of unfounded and misinformed criticism of **tie** which mirrors what you say Martin Foerder alleges.

Such criticism is not only unfounded but it only tells one side of the story. For example I would point out that, as of 6<sup>th</sup> January 2010, of the 518 INTC notices issued, in only 30 cases have estimates been submitted within the specified period, a further 10 have been submitted within an agreed extended period. 172 estimates have been submitted late, in some cases up to 51 weeks late, and there are still 245 estimates outstanding. The balance of 65 have been withdrawn or superceded. So I hope you can see that, against this background criticism of **tie**'s urgency or focus sounds a little hollow.

#### **Audits**

You should be aware from my Chairman's letter before Christmas that it is the Board of which I am a member who require the Audits. You will appreciate therefore that postponing these isn't something I can unilaterally decide upon. I have therefore shared your email with my Board Meeting last Wednesday.

Unfortunately I was unable to tell my Board that there has been any amelioration in the circumstances which prompted them to instigate Audits in the first place. I understand your concern about the Audits taking up management resource, and I have resourced up my team to do this. Audits should not deflect us from working on the other issues. Assuming you and your suppliers have kept accurate records and your team assist in releasing the relevant information the burden on your team can be kept to a minimum. I agree that history won't change, but having a contemporary record of the events will assist resolution before it is necessary to have the whole decided by litigation as suggested by Doctor Keysberg.

Furthermore, I am disappointed that despite your commitment and the warm words in Kenneth Reid's letter your team have elected not to conduct joint audits on the design. This makes it all the more difficult for me to persuade my board that it is not the case that either you have something to hide or are just being un-cooperative. (I would refer you to e-mail traffic between tie and Colin Brady on this point).

## **Programme**

I have re-confirmed with my team the approach you and I agreed back in October. I think some confusion may have arisen from your diagram which was attached to our letter dated 13 November 2009. I suggest that you and I confirm what our joint intentions are.

As I recollect we agreed that as a first step there should be an agreed construction programme which takes account of all known facts (up to 31 October 2009), including delays due to late running utility works, delays due to known and anticipated delayed design and any issues with your supply chain (hence the need for the audit in these areas) but does not include any mitigation measures. For example the updated programme would need to include the impact of the late issue of IFC drawings (I understand that your update in October showed that 40 IFC packages were still outstanding and would not be fully delivered until May 2010). We have no idea of the current situation as your November update was issued and then withdrawn and we have therefore not seen an update since October.

We agreed that this programme will have no contractual significance and does not need to apportion culpability for any delays.

As a second step we agreed to adjust for those mitigation measures which can be applied to reduce the overall programme duration. The resulting programme will again have no contractual significance but will represent the best programme we can all work to. In deciding which mitigation measures to apply we agreed that all actions that reduce the programme duration, and that have a neutral or positive (i.e. reducing) impact on the overall project cost, including delay costs will be considered as mitigation, as per the contract.

We also agreed that we would agree what mitigation to apply as per the above rationale without apportioning culpability for any delays. Once we have agreed a mitigated programme we would then seek to apportion culpability for delays and liability for mitigation costs (I assumed through an EOT claim) which would result in a contractual programme which may or may not differ from the construction programme agreed above.

Step 3 was then to consider acceleration measures which may reduce the overall project programme but would result in an overall increase in costs. This would require instruction under Clause 61.

In terms of the complexity of getting to an agreed programme in this manner, or for that matter a revised Programme we can accept (willingly receive) under Clause 60 it would be much easier if Infraco had submitted timely and complete estimates to support the INTCs and had managed the programme up to date in accordance with Schedule 12.2. I am aware that we did accept, in order to assist in the production of more timely estimates, that some estimates could be produced without the associated time implications, but we also believe that this offer has been abused by Infraco and that your failure to submit complete estimates it is adding to the complexity of agreeing a new programme now.

In addition, Infraco allege that the volume of changes has made it impossible to produce timely and complete estimates. I find that hard to believe at this stage in the project when you have had ample time to resource up to do this. Moreover, any difficulty should only be relative to the standard of the logic links in the base programme. It is also inconsistent for you to say that Schedule 4 was in expectation of many changes, and on the other hand to say you are not resourced to deal with these changes.

## **OSSA**

At times over the last six months we have engaged positively together with you in discussions on a revised agreement. We have, in accordance with our discussions in October, increased our efforts to reach a conclusion and we have also consistently made your team aware of the challenge we will face in recommending any new agreement to our board and shareholders. The more the OSSA departs from a rational meaning of the Agreement, the more difficult seeking any approval becomes.

My statement of the potential issues (legal, risk, value etc) and the possible timescale required to achieve any approval should not be interpreted as a lack of commitment or urgency on our part, more an effort to place realistic expectations on all parties. If Infraco seeks to materially and substantially change the proposed terms of the OSSA from those of the PSSA, to an extent which may make it very difficult for tie to legally accept, an OSSA Agreement will not happen.

I note from my records that as early as 3 June 2009 and on numerous occasions since, most recently in a conversation between Martin Foerder and Steven Bell on 23 December 2009. Infraco have consistently stated that they are not prepared to start the next sections of on-street works without a revised supplemental agreement. In my view there is no justification for this.

I believe there are, and have been for some time, areas across the project where there is no impediment to Infraco starting or progressing with the works and yet Infraco have not started or progressed with the works with due expedition in these areas.

**Clause 80/65 (your e-mail of 14/12/09 refers)**

I wholly respect that you gave the following simple summary on a without prejudice basis and I comment on the same basis. You say:

- Schedule Part 4 is given priority for pricing: Contract Clause 4.3
- Schedule Part 4 says that anything that happens here, triggered by Pricing Assumption, has to go to Clause 80. (Cl. 3.5 of schedule part 4)
- If there is then delay in the process for which tie is liable, the delay is treated as if it were a Compensation Event in terms of Clause 65.

I will not comment in full because opinion that tie has obtained, for the purposes of the DRPs and potential litigation, from Leading Counsel and specialist solicitors show that your interpretation is misconceived because it yields a commercially absurd result which viewed objectively cannot have been intended by the language of the Agreement. On this basis I am confident in our view that Infraco are only entitled to be paid for changes which de facto arise from tie making changes to the Employer's Requirements. A very different position from Mr. Hunter but more aligned with Mr. Wilson.

I will take it that you intend the third bullet point to be a theoretical position. Infraco have abjectly failed to give proper Estimates for alleged changes and accepted changes or to provide substantiated particulars to support any clause 65 notification. The attached schedule shows just how poor their performance has been. Moreover, they have failed comprehensively to fulfil the timing required by the various terms.

In addition they have inflated their claimed adjustment in value. For example on the recent Russell Road Retaining Wall Infraco's first estimate was £4.597 million – reduced in the Adjudication to £1.840 million – awarded £1.461 million. Our summary of the currently outstanding BDDI to IFC related issues is that Infraco's valuation of change amounts to £18.5m whilst tie's assessment is less than £1 million. (I note that the depot access bridge is a significant element of this difference, but it is by no means the only issue).

I do not believe that we have waived any of our rights and at the appropriate time we will be seeking redress for the way you have dealt with DRP's and any excess awarded in Adjudication. As part of the Audit we will be seeking a full certified copy of Infraco's pricing notes so that we can properly evaluate the quantum of any recovery due to us.

**Tentative Off Street Programme.**

Thankyou for your response to my proposal which I received a few moments ago, I shall consider your response and we can discuss when you come over.

To say that I was disheartened to see Martin Foerder's Tentative Off Street Programme is, to say the least, an understatement.

- It gives a misleading impression of the factual situation in many circumstances.
- It obviously seeks to apply unwarranted pressure to tie to agree to Estimates which have not been properly formulated or in fact have not even been submitted to tie.
- It fails to recognise Infraco's own failures to perform.
- It does not show that Infraco are intending to progress the works with due expedition.
- It uses "mitigation" as a cynical exercise.

Steven will respond to Martin's tentative off-street programme this evening – I would strongly urge you ensure that the issues Steven raises are addressed.

**Infraco's Representative.**

I am disappointed to note that the Infraco Representative is absent from site on other business at this critical time and that the Deputy is not to stand in for all matters. Frankly it is difficult for tie not to see this as being a "couldn't care less attitude" to getting this contract finished.

This e-mail is written on an entirely without prejudice basis and cannot be relied upon in any proceedings or action without the expressed written consent of tie limited.

Regards

Richard

Richard Jeffrey  
Chief Executive

**tie** Limited  
Citypoint  
65 Haymarket Terrace  
Edinburgh EH12 5HD

Direct line: [REDACTED]  
Fax: 0131 622 8301  
Email: [Richard.Jeffrey@tie.ltd.uk](mailto:Richard.Jeffrey@tie.ltd.uk)

[www.edinburghtrams.com](http://www.edinburghtrams.com)  
[www.tie.ltd](http://www.tie.ltd)

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