



For The Attention of Martin Foerder
Project Director
Bilfinger Berger Siemens CAF Consortium
9 Lochside Avenue,
Edinburgh Park
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Our Ref: INF CORR 7484/SB

Date: 08th March 2011

Dear Sirs,

**Edinburgh Tram Network Infraco
Payment of Preliminaries**

Thank you for your letter of 4 March (ref: 25.1.201/DG/8131) together with attached documentation.

Within the second paragraph of your letter you appear to provide a highly subjective interpretation of the Decision of Lord Dervaird (published on 2 March 2011). You state that Lord Dervaird decided: "*...Preliminaries are not Construction Milestones or Critical Milestones for the purpose of the Infraco Contract and that the issue of a Construction Milestone Certificate is not a condition precedent to submitting an application for payment of Preliminaries...*". With respect, we agree with your statement that this was the finding of Lord Dervaird; indeed it is a verbatim quotation from paragraphs 1 and 2 of the Decision.

However, you then go on to suggest that Lord Dervaird also determined:

"...Preliminaries are simply a time based cost, with Schedule 5 referring to them solely in respect of the passage of each of the months specified...". Whilst we can find reference for the first part of that sentence (at the beginning of the second sentence to paragraph 2 of Lord Dervaird's email of 2 March timed at 23:06), we cannot find anything which supports second part of that sentence. Indeed, paragraph 3 of the Decision made it quite clear that payment fell due pursuant to clauses 66 and 67: "*...as other costs and expenses to which [the Infraco] is entitled to payment...*". You appear to have decided to ignore this part of the Decision in your letter.

To be clear, on publication of Lord Dervaird's Decision, your solicitors wrote to the Adjudicator asking for clarification in relation to the calculation of preliminaries and the supporting information necessary to allow such calculation. In response, Lord Dervaird replied (in the email from which you appear to have selectively quoted) in the following terms: "*...it appears to me that the documents required to establish the basis of sums being claimed under Clause 67.4 will be those necessary to establish the particular period or periods for which the sums are claimed, together with those which determine the rate or rates payable in relation to the period or periods. Those rates will it appears to me generally be found by reference to the appropriate part or parts of Schedule 5 together with any adjustments or variations made thereto. It is possible that consideration may also have to be given to the items referred to as Preliminaries in Schedule Part 4 page 39 headed Method Related Charges (some of which are described as fixed, and others as Time Related)...*" (Emphasis added)

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Taking the above into account we are surprised at the conclusion you draw, in the fourth paragraph of your letter, as you appear to have entirely overlooked Lord Dervaird's answer to your own question on this point. That is to say that, in the face of the clarification you received from Lord Dervaird to your solicitor's email (with which we assume you would have had input), you have chosen to deliberately ignore the guidance and explanation actually given.

For the avoidance of doubt it is **tie's** position that the information you have provided with your letter is insufficient to allow us to assess your applications for Construction Interim Certificates numbers 29 to 33 (inclusive) not least because it fails to address the necessary adjustments or variations to the rates payable with regard to Schedule Part 5 and further no consideration appears to have been made in relation to the relevant items within Schedule Part 4. To that extent, and at this time, we cannot issue the necessary certificates until you address the shortcomings in the light of the Decision of Lord Dervaird.

In addition, given the clarification provided in addition to this Decision, it is clear that both parties historically have assessed Preliminaries on an incorrect and flawed basis which, given the cumulative nature of the applications made to date, inevitably means that the base point from which subsequent Preliminaries were assessed (including those in relation to Certificates 29 to 33 inclusive) will also be incorrect and will require adjustment following the provision of the requisite information by the Infraco. Therefore, until such time as you provide the necessary information to allow an establishment to be made in relation to all Preliminaries claimed to date, we will not be able to undertake a proper assessment of those referred to in your letter. We trust, therefore, you will provide the missing information without further delay.

Yours faithfully,



Project Director – Edinburgh Tram