



For The Attention of Martin Foerder  
Project Director  
Bilfinger Berger Siemens CAF Consortium  
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Our Ref: INF CORR 6316

Date: 29 September 2010

By fax and personal delivery

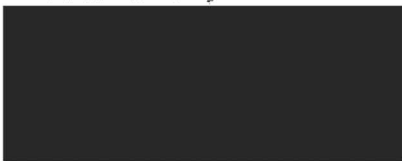
Dear Sirs

**INFRACO CONTRACT  
REMEDIABLE TERMINATION NOTICE**

Enclosed is a Remediable Termination Notice in respect of Infraco Default (a) under the Infraco Contract.

We look forward to receiving your rectification plan within 30 Business Days of the date of this Remediable Termination Notice.

Yours faithfully



Steven Bell  
Project Director – Edinburgh Tram

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## REMEDIAL TERMINATION NOTICE

### INFRACO DEFAULT (A): CLAUSE 80 - TIE CHANGE

#### 1. Infraco Default (a)

- 1.1 The Infraco has breached its obligation to comply with the contractual mechanism contained in Clause 80 of the Infraco Contract in cases where (a) **tie** has required a **tie** Change and (b) the Infraco has notified a **tie** Change.
- 1.2 The Infraco has persisted in refusing to comply with the contractual mechanism included in the Infraco Contract to regulate **tie** Changes. The Infraco has demonstrated a course of conduct amounting to an abuse of the application of Clause 80, by persistently failing to meet the contractual obligations to give contractually compliant and timeous Estimates in relation to the **tie** Changes. The **tie** Change process in the Infraco Contract is recognised and is of the essence for the proper operation and discharge of both Parties' obligations.
- 1.3 This breach materially and adversely affects the carrying out and completion of the Infraco Works by causing serious delay to works which are subject to **tie** Changes and meaning that no contractually competent programme can be presented by the Infraco which accounts adequately for the time needed to be agreed for the execution of the **tie** Changes, compounded by the Infraco's refusal to progress the Infraco Works before the issue of a **tie** Change Order or the referral of a disputed Estimate to the Dispute Resolution Procedure. This breach materially and adversely affects the carrying out and completion of the Infraco Works by interfering with **tie**'s rights under the contractual mechanism to deal with **tie** Changes pursuant to the Infraco Contract, delaying the progression of the Infraco Works and by frustrating the **tie** Change process and consuming **tie** project management and staff time.
- 1.4 This is an Infraco Default (a) under the Infraco Contract.

#### 2. Nature of Infraco Default which requires to be rectified

- 2.1 The Infraco has demonstrated an ongoing course of conduct which evidences breach of its obligations under Clause 80.
- 2.2 This course of conduct includes:
  - 2.2.1 **Automatic notification of a tie Change** - Infraco Notices of **tie** Changes ("INTCs") are automatically notified to **tie** in the form of a standard letter. As at 5pm on 28 September 2010 (the eve of the issue of this Remediable Termination Notice), there have been 750 INTCs notified by the Infraco. 120 of these INTCs have subsequently been withdrawn, deleted or superseded. Out of the remaining 630 INTCs, around 125 notifications allege "design change" without explanation. The Infraco routinely submits an INTC stating that a Notified Departure has occurred (the occurrence of a Notified Departure triggers the **tie** Change process). The Infraco steadfastly has refused and continues to refuse to provide any explanation or proper reasons for the occurrence of the Notified Departure. This lack of transparency and visibility and intentional non-compliance with requests from **tie** for information (in order for **tie** to understand the Notified Departure) is very detrimental to the **tie** Change process, leading to delay, cost and, in some cases, the need for **tie** to refer INTCs to Dispute Resolution Procedure, simply to gain an understanding of the Infraco's position.

- 2.2.2 **Failure to comply with time limits** - the Infraco has breached its obligation to comply with time limits contained in Clause 80 with regard to the provision of Estimates or deliver to **tie** a request for a reasonable extended period of time in which to submit the Estimate. The Infraco's admitted position demonstrates a systematic and endemic breach of its obligations to comply with the contractual time limits. As at 5pm on 28 September 2010, there are 630 INTCs, which are subject to the **tie** Change mechanism in Clause 80. Of the 630 INTCs for which an Estimate is due, only 75 Estimates have been submitted by the Infraco within the prescribed contractual time limit. Many Estimates have been received materially late (up to 492 Business Days late and an average of 137 Business Days late). 274 Estimates are currently outstanding.
- 2.2.3 **Standard letter requesting an extension of time to submit an Estimate** - the Infraco's standard type of letter notifying **tie** of an INTC which is issued in the majority of cases, automatically contains a request for an extension to the period of time for delivering an Estimate, without any explanation or any quantification. The Infraco systematically refuses to provide additional clarification when requested by **tie**.
- 2.2.4 **Failure to comply with extended time period to submit an Estimate** - where an extended period to provide an Estimate is agreed, the Infraco has always failed to submit any Estimate within the agreed extended period(s).
- 2.2.5 **Non-delivery of Estimates** - as at 5pm on 28 September 2010, the Infraco has submitted 356 Estimates (out of 630 INTCs). This means that 274 Estimates remain outstanding. The Estimate which is outstanding for the longest length of time is for 596 days. The outstanding Estimates are on average 326 Business Days late.
- 2.2.6 **Submission of incomplete Estimates** - the Infraco has repeatedly breached its obligation to submit complete Estimates in accordance with Clause 80.4. Clauses 80.4.1 to 80.4.10 of the Infraco Contract lists the matters on which the Infraco must provide its opinion (acting reasonably) in all cases where the Infraco delivers an Estimate to **tie**. As at 5pm on 28 September 2010, the Infraco delivered 356 Estimates to **tie**. The vast majority of these did not contain the Infraco's opinion on all of these matters.
- 2.2.7 Out of the 356 Estimates which have been submitted by the Infraco, the vast majority of Estimates generally only address the Infraco's opinion to Clause 80.4.10 (increase or decrease in the sums due to be paid to the Infraco as a direct consequence of the implementation of the **tie** Change).
- 2.2.8 **Non-compliance with mitigation obligations** - in providing an Estimate to **tie**, the Infraco has repeatedly breached its obligations under Clause 80.7 to use its reasonable endeavours to minimise any increase in costs and maximise any reduction of costs and to demonstrate that it has investigated how to mitigate the impact of any **tie** Change and implement the **tie** Change in the most cost effective manner. The Infraco has breached its obligation under Clause 6.3.1 to approach all Permitted Variations on a collaborative and Open Book Basis.
- 2.2.9 The Infraco has not demonstrated that it has used its reasonable endeavours with any regularity to minimise costs and mitigate the impact of **tie** Changes for **tie** and implement **tie** Changes in the most cost effective manner. The Infraco has not demonstrated (neither as part of the **tie** Change obligations nor when given the opportunity to demonstrate through audits carried out pursuant to the Infraco

Contract) that it has taken steps to mitigate costs and obtain best value for tie with regard to tie Changes. The Infraco has evinced, and continues to evince, a non-collaborative and exploitative approach to the tie Change process and the submission of Estimates.

- 2.2.10 **Over-valuation of Estimates** - the Infraco persists in submitting grossly over-valued and inflated Estimates for numerous INTCs and has done for over two years since contract award. In respect of the INTCs for which an Estimate is submitted, the Infraco regularly re-submits its Estimate, the value of which is considerably reduced from the initial Estimate submitted. When an Estimate which has been submitted is reviewed and challenged by tie, the Infraco regularly reduces considerably the value of its Estimate. Estimates which have been challenged and settled through the Dispute Resolution Procedure have all been very substantially reduced in value.
- 2.2.11 As at 5pm on 28 September 2010, the issued tie Change Orders in respect of INTCs show an average agreed value of 53% less than the value of the Estimate submitted. This is a huge reduction, which illustrates that the Estimates are grossly over-valued by the Infraco to begin with. This conduct is contrary to Good Industry Practice, the Infraco's duty of care owed to tie and the Infraco's obligation to approach all Permitted Variations on a collaborative and Open Book Basis. In all these instances, the Infraco's conduct and over-valuation of Estimates causes delay and consumes time and tie resource in order to attempt to settle a fair and reasonable value for the Estimate.

### 3. Rectification Plan

- 3.1 tie looks forward to receipt of a comprehensive rectification plan from the Infraco addressing this Infraco Default (a) within 30 Business Days of the date of this Remediable Termination Notice.
- 3.2 In order to rectify this Infraco Default, the Infraco would require to present a rectification plan addressing the delivery of all outstanding Estimates in accordance with the Infraco Contract; the commitment to deliver contractually competent Estimates or acceptance that tie is entitled to treat the incomplete Estimate as what is required to be valued under Clause 80 (in the absence of any further information) and any additional entitlement in respect of the relevant tie Change is extinguished; and the prompt revisal of inflated Estimates. tie would also expect any rectification plan to present proposals as to how the Infraco intends to remedy going forward the course of conduct which the Infraco has demonstrated to date towards the tie Change mechanism in Clause 80.

for and on behalf of tie Limited



Project Director

19 September 2010 Date