

Our ref: 25.1.201/KDR/7390  
Your ref: INF CORR 6316

Bilfinger Berger-Siemens- CAF Consortium

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9 November 2010

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For the attention of Steven Bell – Project Tram Director

Dear Sirs

**Edinburgh Tram Network Infraco  
Infraco Contract: Alleged Remediable Termination Notice (Clause 80)**

We refer to your letter dated 29 September 2010 (INF CORR 6316) which purports to enclose a Remediable Termination Notice in relation to allegations that Infraco has failed to comply with the contractual mechanism in Clause 80 of the Infraco Contract.

As at the date of writing you have served Remediable Termination Notices in respect of another 9 matters. None of these matters have been the subject of referrals to dispute resolution. It appears to us that tie has abandoned the contractual mechanism for resolution of disputes. This may be because every major issue of principle has been decided against tie in adjudication. However, that is no justification for now abusing the termination provisions of the contract. It is clear that tie is now pursuing a policy of serving a Remediable Termination Notice in respect of each and every grievance it may have, regardless of the significance of each grievance and its implications for the Infraco Works. Whilst we will respond to each Remediable Termination Notice in turn, we object to tie's adoption of this policy.

For the avoidance of doubt this letter does not nor is it intended to constitute a rectification plan.

We summarise our response to the Notice as follows:

1. The Notice contains a series of unsubstantiated and general accusations which do not identify any particular breach of Infraco's obligations under the Infraco Contract.
2. You have made no effort to describe how these accusations can be said to materially and adversely affect the carrying out and/or completion of the Infraco Works.
3. The Notice does not therefore identify an Infraco Default (a).
4. Your letter does not therefore constitute a valid Remediable Termination Notice.
5. Any attempt to terminate the Infraco Contract on the basis of this alleged Notice will be entirely without contractual basis.

This is further explained as follows:

**1. Allegations of Breach of Contract**

You allege that Infraco has "demonstrated an ongoing course of conduct which evidences breach of its obligations under Clause 80". We deal with your accusations below. However, by way of general comment, it is clear to us that your understanding of what constitutes a breach of contract in respect of Clause 80 is based upon your interpretation of the requirements of that Clause. There have been a series of adjudications which have addressed aspects of Clause 80 and the change mechanism. On every point of principle, tie has been shown to have been wrong. Yet it is clear from your letter of 29 September 2010, that you refuse to accept the decisions of the adjudicators.

For example, you refer to Infraco's "refusal" to carry out Changes before the issue of a Change Order or the referral of the Estimate to dispute resolution and call this a "breach". Lord Dervaird's decision of 7 August 2010 makes it clear that Infraco is both required and entitled to refuse to carry out Changes in these circumstances.

We also note that your letter is so general as to be incapable of meaningful response. You make broad allegations in respect of *all* Changes when it is perfectly evident that *each* Change has to be considered on its own merits.

For example, you allege delay in production of Estimates but fail to acknowledge Infraco's requests for reasonable extended periods within which to provide Estimates given the complexity of the Estimate. This is a project where tie took 9 months to agree the period of delay attributable to the very first INTC, and a further period of 8 months through the dispute resolution procedure to agree the associated financial impact. You have failed to acknowledge delay in respect of any other INTC. The extent to which any INTC is likely to require an extension of time is inevitably bound to the extensions of time which may be awarded in respect of other INTCs. tie's refusal to even acknowledge that matters are Changes (let alone acknowledge the delay caused by them) has rendered the process unworkable and frustrated the production of Estimates.

These are general comments of course; an explanation can be given in respect of each INTC. However your purported Notice gives us no opportunity to do so.

Turning to the allegations which you allege constitute a "course of conduct":

**1.1 Alleged "Automatic" Notification of a tie Change**

With regard to the statistics you quote, as at 8 November 2010, 766 Changes have been notified – 98 by tie and 668 by Infraco. 101 of these Changes are no longer current having typically been superseded by and absorbed into more recent Changes. Of the remaining 665 Changes, tie has only accepted that 317 of these are Changes.

Infraco has notified the existence of Notified Departures in accordance with the terms of the Infraco Contract. In each case, this is done after due consideration of both the factual circumstances and also whether or not these constitute a Notified Departure in terms of the Infraco Contract. The Notices sufficiently identify the nature of the Change. References to "design change" clearly reference Pricing Assumption 3.4 and the Notices provide sufficient references for tie to be able to form its view on whether or not a Notified Departure has occurred.

In each case, tie has had more than sufficient information to form such a view, and indeed has done so. tie invariably refuses to accept the claim that a Notified Departure has occurred (thereby rendering any interest in a subsequent Estimate to be academic to tie). The basis for tie's rejection of INTCs in principle has been shown to be unfounded in successive adjudications. We refer you to the adjudications for Gogarburn, Carricknowe, Russell Road Retaining Wall 4, Section 7A Drainage etc for example. Each adjudication has proceeded upon tie's *express rejection* of the relevant Infraco Notification of tie Change (INTC), not a lack of understanding of what has been alleged.

Any delays in the Clause 80 process have been the result of tie's refusal to accept the existence of INTCs and not - as you now imply - an inability to form a view on the question.

## 1.2 Alleged Failure to Comply with Time Limits

As noted above, the period for provision of Estimates must be considered in respect of each particular Change given the provisions of clause 80.3 of the Infraco Contract. Your allegations cannot, therefore, be answered meaningfully.

We do have the following general comments however.

The consequences – in terms of time and money - for each Change that occurs on this project have to be considered in the context of all the Changes that precede it. A Change may or may not have time and financial consequences depending upon the treatment of those preceding Changes. Here, tie has systematically refused to acknowledge even the existence of INTCs, far less agree Estimates for these. This has certainly been driven by tie's misinterpretation of the Contract even after it has shown to be wrong in adjudications. It appears now that it has also been driven by concerns about tie's ability to pay for these Changes. The result has been a background of complete uncertainty which is compounded with each new Change.

It should be no surprise therefore that the full consequences of many Changes – to the level of detail demanded by clause 80.4 – are not apparent to Infraco within 18 Business Days of the INTC. Infraco has requested extended periods for submission of Estimates to take account of this complex situation, but tie *has not agreed to a single day's extension in respect of a single Change*.

Your accusations of delay in production of Estimates are presumably based upon an expectation of delivery within 18 days. It is your failure to properly administer the Contract that has given rise to the complexity that makes this time period impossible. It is your unreasonableness that has refused to acknowledge this and agree to extended time periods for delivery of Estimates.

However, we also query the concern you effect in respect of the timing of Estimates. You have failed to accept that over half of the notified INTCs are valid and you presumably have no interest in the contents of any Estimates for those INTCs, regardless of when they are produced. To complain about the timing of Estimates which you have no interest in considering is entirely disingenuous. Presumably, your complaint is that these Estimates ought to have been provided earlier in order that you could ignore them sooner?

Should you consider resurrecting the argument that you cannot decide upon the validity of an INTC until you have seen a full Estimate, we would remind you that this argument was rejected in adjudication.

**1.3 Alleged "Standard" letter requesting an extension of time to submit an Estimate**

Given the circumstances described at para. 1.2, it should also be no surprise that almost all Changes are subject to these difficulties and that an extension is more often than not required. If the letters making this request appear "standard", it is because the circumstances necessitating the request are consistent and true.

**1.4 Alleged Failure to complete with extended time period to submit an Estimate**

Not a single example is provided against this complaint. It is incapable of meaningful response (far less "rectification").

Infraco do not have a record of any extended time period ever having been agreed by tie.

**1.5 Alleged non-delivery of Estimates**

tie has not agreed an extended time period for delivery in respect of a single Estimate, notwithstanding the circumstances narrated at para. 1.2 above. The periods of time tie calculate for these Estimates are all, therefore, calculated by reference to the original 18 Business Day period which is hopelessly inappropriate.

As at 8 November 2010, there are 137 notified Changes for which Estimates are outstanding. Of these tie has only acknowledged that 44 are Changes.

Infraco are following a programme for preparation and/or submission of the 137 Estimates and the prioritisation is based on the latest intended construction sequence and assessed value of the Changes. Infraco have throughout the process of Estimate preparation considered the impact of the latest intended construction sequence in order to mitigate overall delay and prolongation costs.

**1.6 Alleged Submission of Incomplete Estimates**

Again, this general accusation is meaningless without consideration of specific Changes. We would note tie's previous agreement that Estimates ought to be submitted without information as to delay consequences, in recognition of the complex interaction of delaying events on the project and the difficulties in dealing with each delaying event in isolation. It is regrettable that tie seems to have retreated from the position in order to further a contractual argument, rather than try to form an accurate appreciation of the impact of these Changes on the Project.

**1.7 Non-compliance with mitigation obligations**

This too is so general an obligation as to prevent any meaningful response.

You will be aware that tie's interpretation of what are mitigation measures and the extent to which these need to be included in any Estimate was rejected by Robert Howie QC in the MUDFA Revision 8 adjudication. It does not appear however that you have accepted his opinion in that regard.

**1.8 Alleged Over-valuation of Estimates**

Your accusation of "gross-overcharging" in Estimates is no more than rhetoric. Should you wish to properly address the value of Estimates there exists a dispute resolution

procedure that allows you do so. The fact is that when the parties have done so, it is your valuation of the relevant Change – typically "nil" – that is shown to be grossly detached from reality.

In any event, any delay in reaching agreement as to the value of Estimates is not the result of the parties disputing the valuation of the Estimate, but rather your refusal to acknowledge the existence of the Change in the first place, given your failure to accept legitimate INTCs.

**2. No effort to describe how these accusations can be said to materially and adversely affect the carrying out and/or completion of the Infraco Works**

Given the very general accusations made in your letter, it is unsurprising that you are unable to make any assertion that these matters materially and adversely affect the carrying out and/or completion of the Infraco Works.

**3. No Infraco Default (a)**

It follows from the preceding paragraphs that the circumstances you narrate in your Notice do not meet the definition of "infraco Default (a)" in the Infraco Contract Schedule Part 1, contrary to your assertion.

**4. Letter INF CORR 6316 is not a valid Remediable Termination Notice**

As no Infraco Default has occurred, you have no right to serve any Remediable Termination Notice as you have purported to do.

**5. No right to Terminate**

No grounds for termination can arise from this alleged Remediable Termination Notice.

We invite you to withdraw your purported Remediable Termination Notice served with letter INF CORR 6316.

Yours faithfully,

  
**M Foerder**  
Project Director  
Bilfinger Berger Siemens CAF Consortium

cc: R. Walker  
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