

Our ref: **ETN(BSC)TIE=T&ABC#052171**
Your ref: **INF CORR 5995**

Bilfinger Berger-Siemens- CAF Consortium

26 October 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 (Design: Trackworks)**

We refer to your letter dated 8 September 2010 (INF CORR 5995) which purports to enclose a Remediable Termination Notice in relation to matters associated with Infraco's obligations to deliver a fully integrated, assured design for the on-street trackworks under the Infraco Contract.

As at the date of writing you have served Remediable Termination Notices in respect of a total of 10 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. While we do not consider that the allegations set out in the Notice are true or constitute an Infraco Default, we will submit a rectification plan under separate cover on even date of this letter to comply with the extension of time granted by you under cover of letter dated 15 October 2010 (INF CORR 6466).

We summarise our response to the Notice as follows:

1. The Notice does not identify a breach or breaches of contract by Infraco.
2. The alleged breach or breaches do not 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. No Breach of Contract

The Notice alleges a number of breaches which are unfounded and it is far from clear in specifying what factual circumstances give rise to the alleged breaches of contract. We have done our best to interpret the basis of the allegations made. Following this analysis, we consider that the alleged breaches of contract appear to fall into three categories:

- (a) Failure to ensure management of the SDS Provider;
- (b) Failure to ensure System Integration and provide a Case for Safety;
- (c) Failure to observe duty of care and general obligations.

We shall deal with each of these matters in turn.

1.1 Failure to ensure management of the SDS Provider (Clause 11.3)

You do not detail the specific respects in which you consider that we are in breach of our obligations under Clause 11.3, accordingly it is difficult to address this allegation. We note that you refer, as "relevant correspondence", to a letter from Infracore to the SDS Provider dated 28 May 2010 reference: 25.1.201.CBr.2707. This letter was in fact dated 28 May 2009 so is more than 17 months old and the issues identified within it have been addressed.

The BSC Design Management Plan and Systems Integration Plan sets out the approach we have taken to management of the SDS Provider. We have complied with and continue to fully comply with the terms of these plans. Compliance has been reviewed by tie in audits on systems integration and design assurance held on 28 August 2009 (TSA 0901) and 1 October 2009 (TSA 0903) and any issues raised have been closed out. Compliance has been further demonstrated in Infracore's own audit on design management held on 18 May 2010. As such we do not consider that the terms of Clause 11.3 have been breached by Infracore.

1.2 Failure to ensure System Integration and Case for Safety

1.2.1 Failure to Comply with Paragraph 2.8.1 of Part C of Schedule Part 14 (Design Review Procedure – issuance of Design Assurance Statements or "DAS"), and allegations of lack of integration more generally:

The Notice alleges that Infracore are in breach of our obligations in paragraph 2.8.1 of Part C of Schedule Part 14, to provide a Design Assurance Statement along with each design package. We note that "design package" is not a defined term in the Infracore Contract. We refer to the BSC Design Management Plan which proposes a two step approach for compliance with our obligations: (i) individual DAS per "design packages" consisting of either main system scope disciplines or civil works in specific sections, and (ii) an integrated and over-arching DAS "for the combination of all design elements relevant for each geographic sub-section", at such time as all design elements are complete (see paragraph 2.7.3 of tie's Design Management Plan).

The fact that a DAS has not been produced for an element of work does not mean that the design is not integrated. Rather each DAS is simply a statement that provides assurance of how the various design requirements set out in Paragraph 2.8.1 of Part C of Schedule

Part 14 have been satisfied. It acts retrospectively to provide, at completion of a certain "design package", an auditable trail of all the related processes and steps having been successfully completed throughout the Design Management Process. The integration process adopted by Infraco is described in Infraco's design procedures, all of which have been submitted to tie and have been endorsed Level A or Level B. Infraco has a comprehensive record of these procedures being applied.

Pursuant to these procedures we have submitted DAS for a number of design packages, and we are in the process of concluding the "integrated DAS statements" for different geographical sections where the DAS covering all individual design elements already exists. The email correspondence between Steven Bell and Miguel Berrozpe entitled "Design Assurance" between 2 July 2010 to 5 July 2010 cannot be used as evidence or admission of a breach because it simply sets out the process being applied.

At the date of the Notice, Infraco had not submitted a DAS for the on-street trackworks design package. This does not constitute a breach of our contractual obligations or an Infraco Default but is simply a consequence of numerous changes (both tie Changes and Infraco's Proposals) relating to the Design Management Process, which have affected, and continue to affect, the conclusion of this design package. At the date of service of the Notice, elements of scope relating to on-street trackworks were still to be agreed by tie, and are subject to INTCs (e.g. floating slab), final designs are awaiting tie approval and information is outstanding from tie in relation to the satisfactory completion of the Utilities Diversion Works, directly affecting the ability to use the fully integrated design produced by Infraco for on-street trackworks.

As set out above, the design of the on-street trackworks is still in progress and will be carried out to meet Infraco's contractual requirements. Accordingly, as stated above we will submit a rectification plan to tie under separate cover. We clarify that this plan will include not only actions to be completed by Infraco, but also by tie and other parties.

1.2.2 *Failure to Comply with Clause 8.1.6*

We confirm that Infraco is working in accordance with its obligations under the Infraco Contract to ensure that certain key elements of the system integration of the Infraco Works are implemented. This includes ensuring that safety assurances and the Case for Safety are achieved at the issue of a Certificate of Sectional Completion. Given that a Certificate of Sectional Completion has not been issued we are at a loss to understand why you allege that this obligation has been breached.

1.2.3 *Failure to Comply with the Employer's Requirements:*

You identify four alleged breaches of the Employer's Requirements. We respond as follows:

- (a) **Section 3.6.1 (Design: General Obligations):** It is not clear in what respects you consider that we are in breach of this obligation but we assume your specific concern relates to the Case for Safety for trackworks. Deliverables setting out how Infraco will meet its obligations in relation to the Case for Safety have been submitted to tie and have been endorsed either Level A or Level B. We have submitted the Case for Safety (Trackwork) which has now been endorsed by tie at Level B. If any adverse comments by tie or by the Independent Competent Person ("ICP"), or any subsequent developments or changes to the design, necessitate amendments to the Case for Safety (Trackwork), Infraco has and will continue to incorporate these and re-submit



the amended version. We consider that our obligations at this time have been fully complied with, and as such there is no breach.

- (b) **Section 3.6.1 (Design: General Obligations):** We do not accept that there has been a breach of this requirement. A "V" life cycle model was developed and incorporated in the Project Management Plan and the Preliminary Case for Safety (Systems). These documents have been reviewed by tie and the Project Safety Certification Committee and endorsed either Level A or Level B. The approach set out in these documents has been and continues to be followed by us.
- (c) **Section 3.6.2 (Design Approach):** The development of the Case for Safety is an ongoing obligation and we regularly undertake supplementary analysis to allow its further development. Agreed processes are in place to ensure that Infraco continues to fulfil its obligations in this regard. There has been no breach of Infraco's obligations in this regard. This is demonstrated in Section 4.4.2.3 of the Preliminary Case for Safety (System) which identifies the ongoing supplementary analysis which has been undertaken to date.
- (d) **Section 17.2.6 (The Railways and Other Guided Transport Systems (Safety) Regulations 2006) ("ROGS"):** You do not detail the specific respects in which you consider that we are in breach of this section which makes it difficult to answer your allegations. In fulfilment of our obligations under ROGS, we have, from contract signature attended and actively participated in the Project Safety Certification Committee in accordance with tie's written Safety Verification requirements. We consider that the Case for Safety is being developed to the satisfaction of the Independent Competent Person and Project Safety Certification Committee. We are not aware of any current objections from either party as regards Infraco's identification of the Safety Risks or the process and implementation of the Safety Management System. In light of the above, we do not consider there has been any breach of the obligations in this section. Any adverse comments that have been and are subsequently received have been and will continue to be properly addressed.

1.2.4 Failure to Comply with Clause 8.5 and Clause 10.9

All elements of our design relative to the Edinburgh Tram Network are compatible with system integration, and we continue to make qualified personnel available to ensure systems integration throughout the term. As such we do not consider that we are in breach of Clause 8.5.

In the event that any Deliverables have been found not to fulfil the requirements of the Infraco Contract or any Approvals Body, such deliverables have been amended accordingly. This is a process that has been, and will continue to be, applied by Infraco and as such there has been no breach of Clause 10.9.

1.3 Failure to observe a duty of care and general obligations (Clauses 7.1 and 7.2)

We assume that the general allegations of breach relate to Infraco's alleged failures in relation to management of the SDS Provider, issuance of DAS statements, systems integration and the Case for Safety. For the reasons set out above, we do not accept that we are in breach of the specific obligations as alleged by you. Without any other specific allegations of breach being made we do not agree that we are in breach of our general obligations as set out in Clauses 7.1 and 7.2.



2. Carrying out and/or Completion of the Infraco Works not materially and adversely affected

None of the alleged breaches identified by you materially and adversely affects the carrying out and completion of the Infraco Works. If carrying out of any Infraco Works is impeded because sections of the on-street trackworks design are still being finalised, this is simply a consequence of changes (both tie Changes and Infraco's Proposals) relating to the Design Management Process, which have affected, and continue to affect, the conclusion of this design package.

You also allege that Infraco's failure to deliver an integrated, assured design for the on-street trackworks has prevented tie from issuing Permits to Commence Works pursuant to the Code of Construction Practice. The documentation required to be submitted by Infraco in terms of paragraph 3.4 of Schedule Part 3 (*Code of Construction Practice*) is the Permit to Commence Works Form which identifies the necessary licences, third party approvals and notifications that have been obtained/granted to enable the works to be undertaken, together with the specific control measures that require to be implemented under the Infraco's safety management system.

A fully integrated, assured design is not a condition precedent to the issue by tie of a Permit to Commence Works. According to tie's own Design Management Plan any design endorsed with Level A or B "*may be used or implemented for the purposes for which it is intended*". All our on-street trackworks design (irrespective of whether they may be still subject to changes) are endorsed with Level A or B. The fact that a fully integrated, assured design is not a precondition to tie issuing a Permit to Commence Works is further supported by tie's approach to date which clearly demonstrates that the issue of a Permit to Commence Works is in no way linked with the existence of a fully integrated, assured design.

There is no basis in the Infraco Contract for tie alleging that it is unable to issue a Permit to Commence Works because of any alleged failure to deliver a fully integrated, assured design. On the contrary, it is tie's failure to issue Permits to Commence Works in circumstances where it is clearly obliged to do so under the Infraco Contract which is adversely affecting the completion of the Infraco Works and frustrating Infraco's efforts to proceed with the works in the relevant Sections.

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 5995 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 5995.

Yours faithfully,


M Förder
Project Director
Bilfinger Berger Siemens CAF Consortium

cc: R. Walker
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