

Our ref: **25.1.201/KDR/6790**

Bilfinger Berger-Siemens- CAF Consortium

22 September 2010

tie limited  
CityPoint  
65 Haymarket Terrace  
Edinburgh  
EH12 5HD

Bilfinger Berger - Siemens - CAF Consortium		BSC Consortium Office
Date Sent	22 SEP 2010	9 Lochside Avenue
Job Number		Edinburgh Park
Area		Edinburgh
Destination		EH12 9DJ
		United Kingdom

Phone: +44 (0) 131 452 2800  
Fax: +44 (0) 131 452 2990

**For the attention of Steven Bell – Tram Project Director**

Dear Sirs,

**WITHOUT PREJUDICE**

**Edinburgh Tram Network Infraco  
Infraco Contract: Contract Issues**

The recent behaviour of tie in how Project Carlisle is being approached and the aggressive campaign of Notices being served on Infraco, is symptomatic of the misery that has persisted throughout this Project.

Infraco has, from the beginning of the Project, been hindered in many ways in its ability to efficiently progress the works. This has manifested itself in the lengthy delays from tie's failure to divert utilities in time and from the huge amount of change that has occurred so far. tie's refusal to properly administer the Infraco Contract and to not recognise tie's obligation in respect of changes, has made the Infraco Contract unworkable. Nearly all the Disputes (13 of 15) raised under the Contract, to determine points of principle, have been adjudicated in Infraco's favour; yet tie still, obdurately, refuses to acknowledge these and refuses then to apply the principles across similar issues. Clearly, from the Adjudication Decisions, Infraco has no obligation to carry out changed works in advance of an agreed estimate; yet tie persists with non-agreement and prevarication.

Coming to Project Carlisle, we note that the two Project Carlisle Proposals are currently on the table; tie's revised Proposal (tie letter 5990 dated 7 September 2010) and Infraco's Revised Proposal (Infraco letter 6682 dated 11 September 2010) provide a detailed breakdown of the gap of circa one hundred and fifty million Pounds. Given the terms of these Proposals, it is extremely misleading to suggest that the gap is not supported by the Project Carlisle negotiations.

In relation to the funding issue, tie representatives have informed us on a number of occasions, and specifically twice last week that Infraco's Project Carlisle price would have to be reduced by between fifty million and one hundred million pounds to stay within the Project's affordability limit. In this context Infraco's "fixation" with funding on a fair value basis must be difficult for tie to address; but tie will appreciate that we are unable to agree to anything other than a price which represents a fair value basis for the works included within the Project Carlisle scope. Infraco will not provide funding for any affordability gap on the Project. We are not contractually obliged to do so under the existing Infraco Contract and will not agree to revised terms which place us under an obligation to provide such funding. Whilst we still seek to reach agreement on Project Carlisle with tie, this apparent lack of funding suggests that it will not be possible to reach such an agreement.

It also clearly suggests that tie and CEC do not have sufficient funds to fulfil tie's obligations under the existing Infraco Contract. This suggestion is corroborated by tie's failure to certify and pay amounts due in respect of Preliminaries (after paying them for nearly two years without question) and works carried out under the PSSA.



*RES*

tie has also failed to pay amounts due in respect of work being done on a "goodwill basis", which we find particularly galling given the circumstances under which the work has been undertaken by Infraco.

As established by Lord Dervaird's decision on the Murrayfield Underpass, Infraco is not required to carry out works which are the subject of an INTC in advance of a tie Change Order or an agreed Estimate. Across the Project, Infraco has carried out such works on a "goodwill basis" in an effort to minimise the disruption to the Project caused by tie's failure to administer the change mechanism and crystallize Infraco's entitlements under Schedule Part 4. However, such works have been carried out in all cases without prejudice to Infraco's contractual entitlements.

We are clearly not obliged, nor are we willing, to fund the Project by performing works on a "goodwill basis" in the absence of an agreed Estimate or tie Change Order or by agreeing to a price for delivery of Project Carlisle which represents anything other than a fair value basis. Therefore, in accordance with the Contract we will cease all works which we are not obliged to perform under the Infraco Contract. We will write to you separately in this regard. This action is to mitigate both Parties' exposure in respect of such works in circumstances where there would appear to be a substantial funding gap for the Project.

With further regard to the current status of Project Carlisle, feedback from our side, on the way the protracted negotiations are proceeding is that tie has completely ignored both our initial Proposal (sent under cover of Infraco letter 6338, dated 29 July 2010) and our Revised Proposal (sent under cover of Infraco letter 6682, dated 11 September 2010). A campaign of issuing Remediable Termination Notices and Underperformance Warning Notices has been pursued by tie in parallel to the Project Carlisle negotiations to place pressure (we assume) on Infraco to agree to tie's terms.

This is clearly contrary to the declared willingness of both Parties to work together with goodwill and collaboration to find a resolution to the serious issues facing the Project. We believe tie is preparing for the failure of Project Carlisle and we will protect our contractual rights accordingly.

In conclusion, as matters stand we do not believe an agreement on Project Carlisle is likely. The affordability gap, tie's persistence and focus on its own revised proposal and complete disregard for Infraco's Proposals, together with the aggressive campaign of Remediable Termination Notices and Underperformance Warning Notices has put paid to almost any prospect of agreement. Nevertheless, we are open to continuing, but tie must understand that, for the scope, programme and terms and conditions in our Revised Proposal, we will not compromise further on our offered price. It is imperative that we reach a conclusion to Project Carlisle so that the current and future situations are clarified for all concerned.

We propose that our respective Senior Directors (G Wakeford, D Darcy and D Mackay) meet at the earliest convenience to facilitate this.

Yours faithfully,

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

cc: D. Darcy  
G. Wakeford  
R. Walker  
M. Flynn  
A. Campos  
M Berrozpe  
A. Urriza