

Our ref: 25.1.201/KDR/5689  
Your ref: INF CORR 4648

**Bilfinger Berger-Siemens- CAF Consortium**

21 May 2010

Bilfinger Berger Civil Ltd	
Date Sent	21 MAY 2010
To Name	
From	
Subject	
Attachments	

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

Dear Sirs,

**Edinburgh Tram Network Infraco  
Infraco Contract -- Infraco -- Response to tie letter INF CORR 4648**

We refer to your letter dated 1 April 2010 (Ref INF CORR 4648) which seeks to respond to the letters issued by Infraco which are listed at the end of the letter.

It is clear from the content of your letter that there remain a great number of respects in which we differ on the meaning and interpretation of the Infraco Contract.

Nothing within your letter causes us to consider that the issues we set out in our letters were in anyway incorrect, or to alter our position in relation thereto. You make accusations that we made assertions 'couched in abusive and inflammatory language'. We absolutely refute that accusation and it should be noted that we were required to send those letters in response to over 100 letters we had received from tie in the course of one week alone, and which, amongst other things, accused us of 'delinquent behaviour'.

We do not wish however, to engage in protracted correspondence which might be deemed in anyway inflammatory. We also do not intend to repeat the facts and explanation of our position as set out in our previous letters. We consider that ultimately, those facts will speak for themselves and that we will be fully vindicated in respect of our actions to date.

However, there are certain specific points which we wish to address as follows.

1. It is beyond doubt that the predominant reason for delay on this project to date has been the delayed completion of the utility diversion works. We have been unable to reach agreement with you on the impact of this Notified Departure. We do not consider that this matter should be dealt with solely with reference to Clause 65. The parties have agreed a mechanism which shall apply where Notified Departures have occurred - they will be deemed to be Mandatory tie Changes and fall to be dealt with in terms of Clause 80 of the Infraco Contract.
2. There is a clear difference between us on the operation of Clause 80.13 of the Infraco Contract. Your position appears broadly to be that our position makes 'no commercial sense'. It would appear to be that this is an argument you intend to run in the face of the unambiguous wording within Clause 80.13 which prohibits us from commencing work until an Estimate has been agreed.

Clause 80.13 was inserted into the Infraco Contract for tie's benefit. This clause clearly states that Infraco is not permitted to commence works which are the subject of a tie Change without either a tie Change Order or agreed Estimate. This allows tie to ensure it has certainty,

transparency and control over Notified Departures and the costs arising therefrom before becoming contractually obliged to pay for them. The mechanism gives Infraco certainty about what it will be paid (and what additional time it will be allowed, if necessary). If agreement of an Estimate is proving difficult tie can, if the matter is urgent, refer the issue to the dispute resolution procedure and at that point, instruct Infraco to carry out the relevant works, notwithstanding the absence of an agreed Estimate. The combination of these two provisions puts tie, on behalf of the ultimate funder of the ETN, The City of Edinburgh Council, in the position of "gatekeeper" of the Clause 80 mechanism. They give the Council, through TEL and the Tram Board, complete control over costs and timing in relation to the incurring of such costs. At the time of negotiation of the Infraco Contract, Infraco considered the requirements for these controls to be reasonable given tie's and ultimately, the Council's exposure under Schedule Part 4.

You will have already received our response to your letter of 19 March 2010 (INF CORR 4487) and subsequent correspondence on this issue. In addition to our fundamental disagreement on the operation of Clause 80.13 and 34.1 and the contractual basis for the issue of the instruction in that letter we are also concerned to confirm with you that the appropriate authorisations and approvals were obtained by tie prior to the issuing of the instruction.

The reason for our concern is that, as already communicated to you, the purported instruction in your letter of 19 March 2010 indicates that tie wishes to abandon the mechanisms in Clause 80 outlined above. We do not consider that you are entitled to do so. However, if an Adjudicator were to agree with your view of the effect of this instruction (which purports to encompass any items of works which is, becomes or is alleged to be a tie Change) said instruction would automatically commit tie and the Council to material and significant additional cost.

You will understand why we are concerned that the issues highlighted above have been appropriately addressed, given tie's proposal that after the issue of this instruction Infraco proceeds on a demonstrable cost basis for all Notified Departures.

3. Against this background, your offer to reimburse our reasonable costs on a 'without prejudice basis' in respect of the On-street works is somewhat unsatisfactory. Not only do you seek to bypass the mechanism in the Contract by which we are to be recompensed, but this offer is subject to a number of prerequisites which, when coupled with your refusal to recognise our proper entitlements in respect of Notified Departures which have already been referred to adjudication, does not provide any comfort to Infraco.
4. We also do not agree that it *'makes commercial sense'* to bypass the provisions of Clause 80 and to deal with Infraco's *'entitlement to extension of time, loss and expense and other compensation through the 'mechanics' of Clause 65'*. We see no need for any innovation on the Contract in the way you suggest. It has always been, and remains, within tie's control to instruct works that it requires to be carried out in accordance with the provisions of Clause 80 and we would urge you to do so.
5. We reject the blanket statement made that we have 'not complied' with our notice and other obligations pursuant to Clauses 65 and 80. We remain confident that our notices are contractually compliant, in particular having regard to the prevailing conditions.
6. In respect of programming issues, we have complied fully with our obligations in this regard and strongly refute any allegation to the contrary. The fact remains that we are attempting to comply with our contractual obligations whilst dealing with a 2 year delay, not of our own making, in respect of which tie is yet to make any reasonable offer of an extension of time which is capable of acceptance. We do not agree that tie has rejected the programmes we have submitted with 'good reason'. As previously advised, and in order to provide an accurate base line against

which progress can be measured, we shall now work to and record progress against Programme Revision 3A submitted to tie under reference 25.1.201/KDR/5678 dated 11 May 2010.

7. In relation to design, our position has been well documented. We of course recognise that Infraco will be required to substantiate any grounds for delay relied upon, including design. This does not mean that we are required to prove a negative - to the extent that you consider that Infraco has any culpability in respect of the late delivery of the design, it will be for you to prove this assertion.

We do not respond specifically to the remainder of your letter. Any points not responded to should not be taken as accepted by us. It does not appear to us that correspondence of this nature is likely to bring the parties any closer towards resolution of the significant differences between us. Our position remains as previously stated.

Notwithstanding the above, we do remain committed to working constructively with you to find a way through these problems. This cannot however be an abandonment of our contractual rights in favour of a '*commercially sensible approach*', but one which in reality is only so from tie's perspective. We consider that we must work with you to establish a way in which the works can proceed with Infraco's entitlements to payment and additional time, being properly recognised. We remain receptive to all and any suggestions in this regard.

Yours faithfully,

  
M Foerder

Project Director  
Bilfinger Berger Siemens CAF Consortium

cc: R. Walker  
M. Flynn  
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M. Berrozpe  
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